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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 74

GRINNELL CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

BRIEF FOR GRINNELL CORPORATION

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February 18, 1966.

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BRIEF FOR GRINNELL CORPORATION

Opinion Below.

The opinion of the district court is reported at 236 F. Supp. 244, and 1964 Trade Cases ¶71,298.

Jurisdiction.

This is a direct appeal from the district court in a civil antitrust action brought under Sections 1, 2 and 4 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U. S. C. §§1, 2, 4. The defendants are Grinnell Corporation (hereinafter called "Grinnell") and its subsidiaries American District Telegraph Company ("ADT"), Automatic Fire Alarm Company of Delaware ("AFA") and Holmes Elec-

tric Protective Company ("Holmes"). Judgment was entered against all defendants on November 27, 1964, and Grinnell filed its notice of appeal on January 25, 1965. All of the other parties, including plaintiff, have also appealed. The time for filing jurisdictional statements and docketing the case was extended (by Mr. Justice Goldberg's order dated March 23, 1965, R. 785, 787) until April 19, 1965, and this Court noted probable jurisdiction on May 17, 1965. 381 U. S. 910.

Jurisdiction is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989 (15 U. S. C. §29).

Questions Presented.

1. Whether the defendants were deprived of a fair trial and due process by the court below when:

(a) Prior to the trial and before hearing the evidence, the trial judge concluded that defendants were guilty of the offenses charged and announced that, if he were required to conduct a trial, he would enter a decree against defendants far worse than the one plaintiff sought. He peremptorily set the trial date on 18 days' notice (warning defendants, "You would do better to get together with the government") and he refused to disqualify himself.

(b) The trial was conducted by the court in an atmosphere of haste and hostility. The trial judge invited plaintiff to offer all of its evidence "in bulk", admitting it against all defendants without considering their objections. He expressed resentment at having been asked to disqualify himself, and repeatedly indicated that defense counsel's efforts would be futile.

(c) The trial judge then fulfilled his pretrial threats by entering a decree more severe than plaintiff had requested. He did so on the basis of erroneous findings, some of which are contrary to the uncontested facts concerning Grinnell's business and operations.

2. Whether each part of the "three-pronged" decree entered by the trial court is punitive and an abuse of discretion when it:

(a) Divests Grinnell of its investments in each of the other defendants and effectively outlaws it from the allegedly relevant market,

(b) Banishes Grinnell's president, a non-party witness, from continuing employment in his life's work, and

(c) Generally enjoins defendants and their employees, in broad statutory terms, to obey the Sherman Act under pain of contempt of court.

3. Whether the trial court erred in decreeing that Grinnell violated Section 1 of the Sherman Act, without making supporting findings of fact or conclusions of law, but apparently holding Grinnell vicariously liable for any acts of its subsidiaries in restraining competition among themselves.

4. Whether the court erred, in holding that Grinnell violated Section 2 of the Sherman Act,

(a) By defining the relevant market as "accredited central station protection service", excluding competing services for which there is a cross-elasticity of demand.

(b) By its post-trial announcement of a presumption (based solely on the other defendants' share of

this market) that all defendants had violated Section 2, thereby imposing on defendants the burden of proving their innocence.

(c) By making this presumption of guilt conclusive (even though the court found no proof that defendants have power to exclude competition or control prices) and holding all defendants guilty of monopolizing because one of them (ADT) made certain acquisitions and operated at a loss in certain cities.

5. Whether a new trial is required, before a new trier of the facts, or whether the complaint should be dismissed in whole or in part.

Statutes Involved.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U. S. C. §§1, 2, provide in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor * * *."

> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part

of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *."

STATEMENT OF THE CASE.

Grinnell's involvement as a defendant in this case stems from its ownership of most of the stock of the other three defendants (collectively referred to in the opinion below, and here, as "the alarm companies").[1]

The alarm companies are engaged in furnishing various services to customers (called "subscribers") in various localities protecting them against burglary, fire and other risks.[2] These services include installing and maintaining at the subscriber's premises equipment which both detects the abnormal condition protected against and signals an alarm so that appropriate action may be taken by the subscriber, the alarm company, or the police or fire authorities.

These protection or alarm services are usually grouped according to the risk protected against (*e.g.*, burglary, fire, or industrial process malfunction), but they may also be classified according to the location at which the alarm is received and acted upon. This location may be the protected premises (in the case of either "local alarm" services or "proprietary" central station systems) or it may be an off-

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[1] When the complaint was filed, Grinnell owned approximately 76% of the stock of ADT, 88% of AFA and 100% of Holmes. It now owns 80% of ADT, 90% of AFA and 100% of Holmes.

[2] Holmes and its subsidiaries offer burglary and holdup protection in New York City, Philadelphia and Pittsburgh. AFA's operating subsidiary (Automatic Fire Alarm Company of New York) offers fire protection in New York City, Philadelphia and Boston. ADT's subsidiaries offer these and other types of protection services (*e.g.*, against industrial process malfunction) in some 115 cities throughout the United States (Findings 7-9, R. 748-49; R. 676; GX 303, R. 2208, 327). As used herein, GX refers to the government's exhibits, Gr. Ex. to Grinnell's exhibits and D. Ex. to the exhibits of the other defendants.

premises site such as the headquarters of a telephone answering service, or a central station or office operated by an alarm company, or a municipal police or fire alarm headquarters.

The relevant market alleged by the government and adopted by the court below is a limited cross-section of all protection or alarm services consisting only of those services in which the alarm is received and acted upon at an off-premises central station operated by an alarm company (referred to in the opinion below as central station protection service or "CSPS"). This segment was further limited by the court below to central station services which are accredited by insurance underwriters.[3]

Defendants contend that this is an arbitrary and illogical "market", having no basis in the competitive realities of the alarm business. It broadly includes in the same market a company exclusively engaged in offering protection against burglary in one city and another company which offers only fire protection in a city hundreds of miles away, provided only that both of them operate accredited central stations. In fact, such companies are incapable of competing, not only because they offer protection against different risks, but also because (as the court below found) expense and efficiency factors limit central station operations to a radius of about 25 miles from the central station (Finding 3, R. 747). On the other hand, this market definition narrowly excludes other alarm services such as those described above (all of which use automatic alarms) as well as watchmen using manual alarms. These other alarm services compete with central stations so effectively that defend-

[3] Subscribers to protection services may qualify for insurance premium discounts, and both central stations and CSPS installations at subscribers' premises are "accredited" or "certified" by insurance underwriters when they meet standards enabling the subscriber to obtain premium discounts (Finding 5, R. 748).

ants have often been unable to obtain their "minimum basic rates" even in areas where they have no central station competition (Findings 12, 13, 46, 47; R. 749, 756-57).

Assuming, *arguendo*, that the relevant market may be defined as the trial judge held, it appears that the alarm company defendants have a substantial (though declining) share of that market.[4] The court found that, during the period 1957-61, the defendant alarm companies' share of the "total national accredited CSPS market" went from 91% to 87% (Findings 44, 45; R. 756). Breaking this down among the alarm companies, the percentages for 1961 indicate that ADT obtained 73% of the revenues and 61% of the subscribers; Holmes obtained 13% (revenues) and 19% (subscribers), and AFA had 2% in both categories (GX 312, R. 2266, 2268, 331). However, defendants claim that these figures are distortions of the alarm companies' true market shares for a variety of reasons more fully stated in the briefs of the alarm companies.

The gravamen of the complaint is that defendants conspired among themselves to restrain trade in, and to monopolize, this allegedly relevant central station market.[5] Plaintiff's prayer for relief requested, among other things, that Grinnell be divested of its ADT stock (making no reference to its stock in Holmes or AFA) and that ADT be divested of its manufacturing facilities for protection devices, as well as other assets.

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[4] Finding 45, R. 756. The number of competitors offering accredited CSPS has increased from 8 in 1945 to at least 43 in 1963. GX 304, 305, R. 2216-27, 327; D. Ex. D75(b), 4507-08, 496; D. Ex. W6a, R. 4716-20, 4725-26, 497, 595-96.

[5] The complaint refers to "other" conspirators in addition to defendants, but the basic conspiracy alleged by the government and found by the court was an intra-enterprise conspiracy. Among the "other" co-conspirators identified by the government in interrogatory answers were former stockholders of the alarm companies and Rhode Island Electric Protective Company. The court found the latter's relationship with ADT and Grinnell to be "[a]dmittedly * * * a mere makeweight" (Finding 54; R. 760).

Defendants' answers denied these charges, and asserted as affirmative defenses that plaintiff's demand that Grinnell be divested of its ADT stock is lacking in equity (Grinnell having purchased the controlling stock in ADT in 1953, after the Department of Justice had investigated the proposed transaction and had indicated no objection to it); that central station services are inherently local and intrastate in character (because they cannot be performed effectively more than 25 miles from the central station); and that any issues concerning the agreements alleged to be in restraint of trade are moot because of changed circumstances.

Relationship of the Parties.

Grinnell is not, and never has been, engaged in operating central stations, whether accredited or non-accredited, or in rendering any similar services. Instead, it makes and sells various products used by the building construction industry, and does so in competition with larger organizations such as Crane Company and American Radiator and Standard Sanitary Corporation (C81, R. 670).[6] Sales of pipe, related products such as pipe hangers and fittings, and plumbing and heating equipment, account for about 71% of the consolidated income of Grinnell and all of its subsidiaries except the alarm company defendants; the rest is derived from Grinnell's sale and installation of automatic sprinklers, power and process piping systems, industrial humidification systems, and similar equipment (C81, R. 670).

Contrary to the court below's findings, Grinnell does not supply any of these products to the alarm companies as part of the machinery of the central station business.

[6] Prefixes "A", "B" and "C" refer to pages of the Appendices A, B and C hereto. Appendices A and B are excerpts from the record of pretrial proceedings, and Appendix C contains excerpts from the trial transcript.

Prior to 1961, however, Grinnell did make and supply to ADT and AFA certain "actuating devices" used in rendering quite specialized central station services known as sprinkler supervisory and waterflow alarm services (sometimes called "SS&WFA" in the opinion below and here).[7] Although the alarm companies do not sell or install sprinklers, they offer this service to owners of sprinkler systems located within reach of a central station (which most of them are not, C81, R. 671) who want the further protection of an early warning if there is a malfunction in the system ("sprinkler supervisory" service) or if the sprinklers operate ("waterflow alarm" service). As the name implies, an actuating device actuates a signal which is transmitted by other equipment to the central station. For example, one such device (once made by Grinnell) does so when water flows in the sprinkler system, and thus gives warning of possible fire or water damage; other actuating devices (never made or sold by Grinnell) will detect smoke, or a rapid rise in heat, and actuate a signal toward a central station when they occur, thus warning of a possible fire whether or not there is a sprinkler system on the premises (GX 1, R. 807-08, 810-12, 327).

Grinnell supplied SS&WFA actuating devices to ADT and AFA subscribers under the 1907 "Fire Alarm Agreements" described below until these agreements expired in 1954, ten years before the trial of this case. ADT then began making its own SS&WFA actuating devices and had

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[7] The record does not indicate that Grinnell has supplied anything to any of the alarm companies, except for these SS&WFA actuating devices. In fact, however, Grinnell has occasionally sold standard pipe fittings (not CSPS equipment) to ADT and AFA (but not Holmes). These occasional transactions are relatively inconsequential and are mentioned here only for the sake of accuracy. Other equipment used by ADT and AFA in rendering SS&WFA services includes transmitting devices installed on subscribers' premises, connecting wiring, and central station equipment (R. 353-54; GX 1, R. 808-10, 327).

all such devices installed on the protected premises by whatever company had made the original sprinkler installation. By 1961, ADT was able to supply all of its own requirements for actuating devices, and Grinnell stopped making them entirely (C85, R. 687-88).

In short, Grinnell does not compete in the relevant market found by the court below, and it is not a significant supplier to those who do compete in that market. On the contrary, Grinnell is basically engaged in the entirely foreign line of business of making and selling pipe fittings and other products for use by the building industry.

The Lapsed 1906 and 1907 Agreements.

Although the court below found that these agreements had lapsed by 1954 (Finding 51a, R. 758), they are referred to both in the complaint (par. 20) and the court's findings and conclusions, and so they warrant brief discussion here.

The 1906 Burglar Alarm Agreement (Finding 52, R. 758-59) was a territorial allocation agreement between Holmes (when it was owned by the New York Telephone Company) and ADT (when it was owned by Western Union Telegraph Company). This agreement was cancelled in 1947 (D. Ex. E52, E53, R. 4561-62, 496) before Grinnell had any interest in either Holmes or ADT. Grinnell was never a party to it, and there is no evidence that Grinnell even knew of its existence.

The 1907 Fire Alarm Agreements were actually amendments to a 50-year joint venture agreement dated February 18, 1904 between ADT and an inventor who had applied for patents on SS&WFA devices (Robert L. McElroy, who in 1905 assigned his interest to Automatic Fire Protection Company, or "AFP", GX 79, R. 1361, 327). The inventor undertook to solicit subscribers to this new service for 45% of the subscriber revenues. ADT, which had been

organized to supply messenger services out of Western Union's telegraph offices, agreed to provide SS&WFA services out of these offices for 55% of the resulting revenues (GX 78, R. 1353-60, 327). However, ADT and AFP were soon locked in such a hopeless patent conflict with the AFA companies and Grinnell (then called "General Fire Extinguisher Company") that each of them needed a license from the other in order to use its own SS&WFA patents without risking infringement (R. 300-01, 495). The 1907 Fire Alarm Agreements resolved this impasse and permitted this new service to get started (GX 80-A, 80-B, 80-C, R. 1362-67, 1374, 1380-83, 327).

Under them, the AFA companies (in the three cities in which they operated) and AFP (elsewhere in the United States) were to solicit SS&WFA subscribers and provide the requisite transmitting devices for sending signals to the central station. Grinnell was to develop and manufacture SS&WFA actuating devices, install them in subscribers' premises (retaining title), and repair or replace any which might be damaged by fire, earthquake or other specified causes during the life of the agreement. ADT was to install the transmitters provided by AFA or AFP, connect them to Grinnell's actuating devices (and to the leased telephone lines over which the signals would be sent to the central stations), provide, equip and operate the central stations, and generally perform the SS&WFA contracts AFA and AFP had entered. For these services, ADT was to retain 50% of the subscriber revenues and pay Grinnell and the soliciting company (AFA or AFP) 25% each (GX 80-A, 80-B, R. 1366, 1374, 327).

This arrangement was later modified by agreements between ADT and AFP (to which Grinnell was not a party) under which ADT assumed AFP's functions and became

entitled to 75% of the SS&WFA revenues outside of the three cities where AFA operated (New York, Philadelphia and Boston). As a result, ADT provided SS&WFA services jointly with AFA in these three cities, but rendered these same services independently of AFA elsewhere (R. 550, 634-35).

Many years before these agreements were to expire, ADT and Grinnell had lengthy negotiations looking towards renewal of them. ADT broke off these negotiations in 1950, acting on the advice of its counsel that any renewal might be an unlawful exclusive dealing arrangement (C55-7, R. 567-69; R. 682). Grinnell suggested seeking the advice of the Department of Justice on this question, but ADT declined (GX 85, R. 1415, 327). As the February 18, 1954 termination date stated in the original 1904 agreement approached, the parties were faced with the problem of what to do about the Grinnell-owned actuating devices installed in ADT subscribers' premises. They resolved this problem by a "Device Sale Agreement" under which Grinnell sold to ADT all the actuating devices Grinnell had installed in ADT's subscribers' premises over the years.[8]

From February 18, 1954 on, ADT was free to supply its own actuating devices and to have them installed by any sprinkler company it chose, and it did so even though Grinnell had acquired control of ADT's stock before this policy went into effect (C84-5, R. 687-88).

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[8] This Agreement became effective on February 18, 1954, but it had been concluded in 1952, well before Grinnell had any notice that Western Union's ADT stock might be for sale (R. 677, 684, 687-88). Under it, ADT agreed to pay for these devices in annual installments of 17½% of the 1954 revenues from the particular SS&WFA contracts they served, as long as they remained in force. A separate "Device Sale Agreement", on the same terms, was later entered between Grinnell and AFA (R. 684).

Grinnell's Investments In The Alarm Companies.

The construction industry, to which Grinnell's fortunes are tied, has historically been most sensitive to fluctuations in the general business cycle. In the 1930's, Grinnell suffered severe losses which were offset in part by the revenues it received from supplying SS&WFA actuating devices (Gr. Ex. J75; R. 4229, 668). As a result of this experience, Grinnell became aware that the alarm industry's income was a virtually depression-proof balance to its own construction-based sales. It became particularly interested in investing in the alarm industry when it anticipated that by 1954 the revenues it had been receiving from supplying SS&WFA actuating devices would be curtailed (R. 675-76; Gr. Ex. J2, R. 4052-53, 668).

Consequently, when two individuals having a majority interest in AFA's stock offered to sell it in 1949, and when the New York Telephone Company put all the stock of Holmes up for sale in 1950, Grinnell took advantage of these opportunities.[9] These stock purchases, and Grinnell's purpose in making them, were reported to Grinnell's stockholders in its president's annual report for 1950 as follows:

> "During the year we increased our investment in the Automatic Fire Alarm Company of Delaware, which I discussed at our annual meeting in 1950, and also purchased in 1950 from the New York Telephone Company all of the stock of the Holmes Electric Protective Company.
>
> "The Automatic Fire Alarm Company is engaged in furnishing central station automatic fire alarm and automatic sprinkler system supervision in New York, Philadelphia and Boston. The Holmes Company furnishes central station burglar alarm and bank vault protection service in New York, Philadelphia and Pittsburgh. Since 1907 our Company has

[9] It paid $1,300,000 for 51% of AFA's stock, and $4,256,000 for all of Holmes' stock (R. 674, 675).

been interested in the business of furnishing central station fire alarm and sprinkler supervisory service and it was income from this source which substantially helped the Company in weathering the last depression during which dividends were omitted for three years and the market value of our stock dropped to $4.50 a share.

"The Automatic Fire Alarm and Holmes Companies are long established concerns in the same field of furnishing central station protective services and operating largely in the same areas, whose past earnings records demonstrate that they are engaged in about as depression-proof an industry as can be found." (Gr. Ex. J2, R. 4052-53, 668)

Since AFA furnished only fire protection and Holmes was engaged solely in furnishing burglary and holdup protection, these two companies complemented, but did not compete with, each other (R. 675-76).

In May of 1953, a broker approached Grinnell and offered to sell Western Union's 62% stock interest in ADT. The parties shortly thereafter agreed on a price of $12,500,000. Grinnell made a 5% down payment (R. 677, 679), and arranged to borrow the purchase price pursuant to a loan agreement with The Equitable Life Assurance Society of the United States which was conditioned on the latter's receiving a satisfactory legal opinion that the stock acquisition would not violate the antitrust laws (R. 680; Gr. Ex. J51, R. 4204, 668).

About one week before the scheduled closing date, Grinnell received a letter from Hon. Stanley N. Barnes, the then Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, stating that Grinnell's proposed acquisition of ADT stock raised certain questions under the antitrust laws and requesting specified information concerning this announced acquisition (C82,

C83, R. 679-80; Gr. Ex. J52, R. 4205-06, 668). On receipt of this, Grinnell put off the closing "until the matters raised by this letter are cleared up" (Gr. Ex. J53, R. 4206, 668). James Douglas Fleming, Grinnell's president, testified without contradiction:

> "We decided that unless we could get a clearance from the Department of Justice we definitely would not go through with the deal, even if we had to forfeit the $625,000 down payment which we had made." (C83, R. 680)

Grinnell supplied the Department with all the information it requested as well as additional material. These submissions included the 1907 Fire Alarm Agreements; descriptions of the businesses of Grinnell, ADT, Holmes and AFA; lists of competitors; balance sheets, and profit and loss statements (C83, R. 680-81; Gr. Ex. J76, R. 4315-18, 668). Several conferences were held between representatives of the Department and counsel for Grinnell.[10] After the Department's Legislation and Clearance Section had considered the matter, Judge Barnes wrote to Grinnell's attorney thanking him for his cooperation (C84, R. 681; Gr. Ex. J55, R. 4208, 668), indicating that the Antitrust Division had completed its investigation and did not plan any action. Grinnell's counsel then advised it that the Department had given a "clearance" so that the parties could proceed with the closing (C83, R. 681), and gave the lending institution the antitrust opinion it required (R. 689; Gr. Ex. J70, R. 4226-27, 668).

Two years later, in 1955, General Alarm Corporation, a competitor of ADT in Boston, was offered for sale. In

[10] The government's answers to interrogatories list seven Antitrust Division attorneys who participated in the 1953 investigation, including the then Assistant Attorney General and the then Chief of the Legislation and Clearance Section of the Division (Gr. Ex. J76, R. 4309, 4310, 4311, 4314, 4315, 668).

view of the interest shown by the Department of Justice in Grinnell's acquisition of ADT two years earlier, ADT stated it would acquire General Alarm only if the Department of Justice would "clear" that transaction. It applied to the Department and, after several conferences and submittals of material, received a letter from Assistant Attorney General Barnes advising that the Department did not "presently intend to take action with respect to the proposed acquisition" (R. 552; D. Ex. U-1, R. 3686, 552).

After receiving this "no action" letter, ADT proceeded to consummate the only acquisition ever made by any of the alarm company defendants in the allegedly relevant market subsequent to Grinnell's investments in them (Findings 49, 50, R. 757-58).

Subsequent Operations Of The Alarm Companies.

Grinnell has consistently treated its ownership of controlling stock interests in AFA, Holmes and ADT as investments. It has never attempted to operate the alarm companies' businesses, or to integrate them with one another or with Grinnell.

Instead, these companies have continued to operate in the same way and under the same managements they had when Grinnell had no interest in them (C59, C84-C86, C88-C90, R. 577, 687-88, 690-94). As ADT's president wrote in announcing Grinnell's purchase of ADT's stock to his employees on June 24, 1953:

> "The responsible officials of Grinnell Corporation have stated their intention to have ADT Company and all of its subsidiaries continue to do business in the same manner and under the same management." (Gr. Ex. J66, R. 4219, 668)[11]

[11] Holmes' president wrote a similar letter to all its employees when Grinnell purchased Holmes' stock (Gr. Ex. J65, R. 4216-17, 668).

The result was that ADT's management continued to run its business just as it had before Grinnell had purchased Western Union's ADT stock. Among other things, ADT's executives implemented their prior plans to have ADT make its own SS&WFA actuating devices (instead of purchasing them from Grinnell) and to have them installed by whatever sprinkler company the subscriber had chosen for the sprinkler installation (rather than exclusively by Grinnell).

Grinnell was a "permissive parent" for two reasons. In the first place, Grinnell did not know the alarm business. As an ADT executive of 43 years' experience testified: "Grinnell did not know the operations of ADT. It relied strictly upon its officers to run the business" (C59, R. 577).

Secondly, there were minority stockholders in two of the three alarm companies (ADT and AFA), and Grinnell was reluctant to assume a role in which it might appear to be favoring one company over the other. Mr. Fleming's scrupulous regard for the interests of these minority stockholders was abundantly clear, both in contemporaneous memoranda and at the trial (C84-C86, R. 684, 690-91).

Grinnell has, therefore, been satisfied to protect its investment in the alarm companies by exercising its right to elect their respective boards of directors. In each case, these consist of officers or directors of Grinnell as well as "management" directors chosen from the chief officers of each company. No other Grinnell employee is employed by any of the alarm companies in any capacity (C86, R. 691), and there is no evidence that there has ever been any transfer of personnel between or among any of the four defendants.[12]

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[12] The only other scrap of evidence of any integration between Grinnell's operations and those of its alarm company subsidiaries had to do with a commission plan which Grinnell abandoned as a failure (R. 672-73). Under that plan, Grinnell's sprinkler salesmen could earn commissions if they recommended ADT's SS&WFA services and a sale resulted. By 1963, when the plan was dropped, only five or six of Grinnell's 44 sprinkler offices were reporting

In brief, Grinnell's investment in the stock of the alarm companies has had no discernible effect on their operations or on their ability (or the ability of others) to compete in the allegedly relevant market.

Pretrial Proceedings.

This action was filed on April 13, 1961. The only judge then sitting in the District Court for the District of Rhode Island (Judge Day) promptly disqualified himself for personal reasons (B7, R. 299). At his request, the Chief Judge of the First Circuit assigned Judge Sweeney (then Chief Judge of the District of Massachusetts) as a replacement but he too disqualified himself *sua sponte*.[13] Accordingly, on March 12, 1962, Chief Judge Woodbury designated the Honorable Charles E. Wyzanski, Jr. (now Chief Judge of the Massachusetts District Court) to hear and decide this case (R. 79).

Extensive discovery proceedings were conducted by both sides; hundreds of thousands of documents were reviewed, and over 100 depositions (totalling about 8,000 pages of testimony) being taken. At one conference, on January 10, 1963, Judge Wyzanski considered whether defendants' taking of depositions might be curtailed by a government motion to quash or by an offer of proof; however, in lieu of either alternative, he imposed a deadline of September 1, 1963 for the taking of depositions (R. 86-87).

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instances of such recommendations (R. 673). Throughout the life of this plan, the total commissions paid to all of Grinnell's 136 sprinkler salesmen combined averaged less than $5,000 a year (R. 673). Moreover, Grinnell's employees occasionally recommend to Grinnell's sprinkler customers that they use the services of competitors of the alarm companies (GX 336, R. 2876, 333, 335). The government did not make any attack on this commission plan at the trial, and the court made no findings with respect to it.

[13] Judge Sweeney did so on learning that a relative of his was an employee of an organization conducting a market survey for defendants (R. 77-78).

At that conference and thereafter, Judge Wyzanski urged that the parties attempt to settle this case by a consent decree as early as possible.

On December 18, 1963, government counsel reported on the parties' efforts "to settle the case in accordance with the suggestion of your Honor", stating that drafts of consent decrees had been exchanged and that the parties had agreed to meet concerning them (A1, R. 118-19).[14] On the assumption that no agreement would be reached by then, he requested another pretrial conference in mid-February, 1964, for the purpose of hearing defendants' objections to the deposition testimony and documents which the government intended to offer in evidence at the trial (A2, R. 122).

Defense counsel then proposed that, at the next pretrial conference, it would be more appropriate to attempt to narrow the relief issues in the case by considering what relief would be appropriate if the government won. In support of this suggestion, defendants cited the *Handbook of Recommended Procedures for the Trial of Protracted Cases,* adopted by the Judicial Conference of the United States in March, 1960, 25 F. R. D. 351, 358, and the pretrial order entered in *United States* v. *Standard Oil of California,* 1958 Trade Cases ¶69,212 (S. D. Cal. 1958). Judge Wyzanski replied:

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[14] These negotiations had been foundering because of the government's insistence on demands exceeding those contained in its prayer for relief. The complaint sought divestiture by Grinnell of ADT only, but government counsel demanded that Grinnell be divested of all three alarm companies. The complaint prayed for an injunction requiring the alarm companies to give subscribers the *option* to take title to protection devices, but government counsel insisted that subscribers should be *required* to take title—even though this would result in subscribers' losing insurance premium discounts under current underwriting rules. Government proposed decree, R. 141, 143; Defendants' proposed changes, R. 156-57, 159-60; GX 1, 3, 6, R. 792-94, 848, 1091-92, 327.

> "* * * if I understand the suggestion in its full scope, it is really an invitation to the Court to participate in a discussion of relief without addressing itself to the merits." (A6, R. 126)

After hearing opposition from government counsel, he ruled:

> "It is my view that this is not only in accordance with what is quite customary practice but would be very helpful in this situation." (A9, R. 128)[15]

He entered an order that same day directing the government to submit "the text of the operative portions of the decree plaintiff would request in the event it prevails", together with a supporting memorandum, and directing defendants to answer these papers, giving their version of the specific decretal provisions that would be appropriate in the event plaintiff prevailed (A14, R. 133-34). Following that exchange of briefs, the court scheduled a pretrial conference on relief for May 28, 1964.

On that date, after a preliminary discussion of whether the proposed forms of judgment should be kept under seal (A15-A18, R. 252-55), the following colloquy took place:

> "The Court: * * * Is there anything else? Is there anything other than setting the date for trial?
>
> "Mr. McInerney [for Grinnell]: Your Honor, at our last pretrial conference we discussed devoting this pretrial conference primarily to the question of relief. If your Honor will recall——
>
> "The Court: Is there any use in my talking about it? Are you near enough so that I can do anything? Or hadn't I just better hold the trial and get it over with? It is not going to take very long. I know that.

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[15] Appendix A to this Brief contains the transcript of this conference insofar as it relates to a pretrial conference on relief, as well as the complete transcripts of all subsequent pretrial conferences.

"Mr. McInerney: Your Honor, it won't take very long for the plaintiff's case to go in.

"The Court: Nor for the defendants' either, I assure you.

"Mr. McInerney: Well, if I may respectfully disagree——

"The Court: You may disagree but I will decide it.

"Mr. McInerney: Well, I would like to point out to your Honor that if we were to go to trial at the present stage of this matter, we would be going to trial on issues far beyond those contemplated by the pleadings in this action because of what had gone before leading up to this pretrial conference.

"* * * we suggested this conference with two purposes in mind. The first one, quite frankly, was we thought that if your Honor would indicate the relief that might be appropriate in this case that that would help both sides to come to a better understanding.

"The Court: I don't think it would help very much.

"Mr. McInerney: Well, your Honor, I think it would help both the plaintiff and the defendants to know what is really at stake here in this trial.

"The Court: I assure you that you would not be helped by anything I would say. *You would do better to get together with the government rather than run the risk of what I would say from what I have seen.* Let me just assure you of that. And I mean every word, and you can underline that four times.[16]

"Mr. McInerney: We had in addition to that purpose, your Honor, a purpose that had to do with the possibility that there might be a trial and that this procedure would not result in a consent decree and that was the narrowing of the issues or the elimination of some of the issues in this case.

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[16] Emphasis has been added to quotations from the pretrial and trial transcripts.

"The Court: The case is set for trial Monday, June 15th, the government to proceed.

"Mr. McInerney: Your Honor——

"The Court: There is no use in discussing it with me. I have read enough to know that if I have to decide this case on what I have seen from the government you will not be in a position at this stage to agree to it.

* * * * * *

"The Court: The trial is to begin on the 15th of June. There will be no delays. Nothing will prevent it except death or serious illness.

"Mr. Fritz [for the alarm companies]: Notwithstanding my understanding of what your Honor has just said, may I just ask this question. There are unresolved as between us many, many objections.

* * * * * *

"The Court: I know. I am going ahead and hear the case. As far as I am concerned, it is going to be continuously tried until disposed of.

"No delays, postponements or further method of avoiding the impact of this Court. The 15th of June." (A18-A20, R. 255-57)

With that, Judge Wyzanski left the bench.

None of the parties had suggested this peremptory trial date. Defendants were not in a position to make their final preparations within the 18 days allowed, and so they moved for a 60-day postponement and for an order limiting the issues to be tried to those framed by the pleadings. Those motions were heard on June 3, 1964, at which time Judge Wyzanski ruled from the bench:

"The Motion to Delay is denied. The trial will begin, as I stated, on the 15th of June." (A28, R. 279)

"Mr. McInerney: Your Honor's ruling on the first branch of our motion makes the second one even more serious as far as we are concerned. That motion is to limit the relief issues to be tried herein to those raised by the pleadings so as to eliminate what we consider the extraneous issues raised by the government's proposed judgment herein.

"The purpose of this is two-fold. I don't need to remind your Honor that the public policy favoring settlement of litigation has been embodied in Section 5 of the Clayton Act and that consent decrees are eliminated from the prima facie effect of Section 5. So that Congress has in effect given defendants the right, if you will, to capitulate to government demands.

"The Court: Yes. I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial.[17] You have invited me, therefore, into what I regard as, from your point of view, a rather undesirable situation. I think I made that clear at the beginning. I have told you that, forced by you to look, *my views are more extreme than those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases. Is that clear?*

"Mr. McInerney: Yes, your Honor. I would like to make clear from the defendants' point of view,

[17] Judge Wyzanski never identified these "documents" to which he referred, and defendants are uncertain as to what he meant. The only documents which had been submitted to the court for the purpose of the pretrial conference on relief were the briefs and proposed decrees described above. The government had also filed its trial brief, and a number of depositions had been filed under seal. However, no other documents had been filed, and no documents were offered or received in evidence prior to the trial.

your Honor, that your Honor's statement seems to give some status to government demands that are far beyond what the complaint requests.

"The Court: I am not going to engage in any bargaining or discussion with you. I am not going to limit anything at this stage, not a thing.

"Mr. McInerney: May I just point out two things, your Honor. We do not believe it is consistent either with the Congressional policy of permitting defendants to capitulate to the government demands, which must be the demands in the Complaint, nor consistent with principles of fair play to permit the government to raise the stakes just before the case goes to trial.

"The Court: It isn't just before. *Now anyone who looks at this record will say that Mr. Story did not exaggerate by one jot the situation.*[18] I have been patient beyond my nature, and all I can tell you is that, so far as I am concerned, you are now going to experience what other litigants experience in this Court: justice which I hope is fair, is prompt, is thorough and leaves few shreds for others to worry about.

"Mr. McInerney: I respectfully disagree both with your Honor's statement and Mr. Story's statement to the effect that it is not at the last minute.

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[18] The only "record" then before the court was that described in the preceding footnote. The court's reference to the "situation" described by Mr. Story, counsel for the government, must have been to the following portion of his argument:

> "The reports that I have from the field for the little, small, weak competitors of these defendants—this case was filed over three years ago—it is my information from the field that what I call predatory practices have increased intensely since that time, and I think it behooves all of us, your Honor, to bring this case to a trial and get some remedies or get it disposed of just as quickly as possible." (A27-A28, R. 279)

No evidence in support of those assertions was introduced either before or during the trial.

Mr. Story says that he clarified the issues over a year ago, and this is not so with respect to the relief requested. We knew that some of these demands for relief would be made but not all of them.

"The Court: That makes no difference. I determine the relief. I don't think you need worry about the government. If this case is tried, I won't even ask anyone else to draw the decree. I will do exactly what I did in the United Shoe case, which is I will hand down on one day the Findings, the Conclusions, the Opinion and the Decree. I do not follow the practice of allowing litigants in my Court to do the Judge's business of writing the decree. Is that clear?" (A30-A32, R. 281-83)

By this time, Judge Wyzanski had, in his own words, "made defendants realize" that "my views are more extreme than those of the government". Accordingly, on June 9, 1964, they filed affidavits requesting him to disqualify himself from further proceedings herein, stating in part:

"This motion is made with greatest respect for this Court and the United States District Judge presiding. We have reluctantly concluded that it is our disagreeable duty to call the Court's attention to the state of mind in which it is about to judge defendants because due process requires that the trial be conducted by a judge who can and will accord defendants the presumption of innocence to which they are entitled." (¶10 of Grinnell's affidavit, reprinted in full as Appendix B to this brief, B5-B6, R. 297).

That same day, Judge Wyzanski called counsel for all parties before him. He did not hear any argument, but instead told defendants that they would have to make their motion to Chief Judge Woodbury, and that: "If he concludes that for any reason whatsoever the motion is invalid,

I shall proceed as planned on Monday next. Application may be made to him forthwith. He is in New Hampshire." (B7, R. 299).

Chief Judge Woodbury heard defendants' application, and government counsel's opposition, on June 11, 1964, and issued his ruling that same day. He found defendants' affidavits under 28 U. S. C. § 144 "insufficient in law and fact" and inadequate to cause him to exercise "what supervisory powers I may have to designate another Judge in Judge Wyzanski's place" (R. 317-18).

The trial commenced on the date set down, June 15, 1964.

The Trial.

At the outset, defense counsel requested permission to note an objection to the trial date on the ground that they had not had an adequate opportunity to make final trial preparations. They were told:

> "The Court: I have no objection to the notation. I have a strong objection to the misrepresentation. This Court set the matter for November, 1963 and has from time to time postponed it to meet the convenience of counsel." (C1, R. 324)[19]

The court was mistaken in stating that it had set a trial date prior to the May 28, 1964 conference. In September of 1963, the parties estimated that they would be ready for trial by January of 1964, but no trial date was ever fixed prior to the peremptory announcement on May 28, 1964 (R. 110-11).

Plaintiff's Case.

As a preliminary to the expected pretrial conference on objections to them, government counsel had given

[19] Appendix C to this brief contains more detailed excerpts from the trial transcript reporting the incidents described herein, including the entire transcript of the government's case.

defendants a list of the documents and deposition testimony which plaintiff intended to offer in evidence, and defendants' counsel had furnished government counsel with lists summarizing defendants' objections. However, no such pretrial conference was ever held and, as far as defendants know, these documents and deposition excerpts (totalling some 5,000 pages) were not submitted to the court prior to the trial.

Government counsel waived an opening. He then referred to the documents plaintiff intended to offer as exhibits, and Judge Wyzanski stated: "You may offer them in bulk" (C3, R. 326).

Defendants objected to this offer in bulk (C4-C7, R. 327-330) on a variety of grounds listed in the summaries marked as their Exhibits A and B for identification (R. 3242-45), including the objection that most of these documents related to only one or two defendants and could not properly be admitted in evidence against the others. For example, the proffered exhibits included the 1906 Burglar Alarm Agreement between ADT and Holmes, to which neither Grinnell nor AFA were parties (GX 61, R. 1312-15, 327). Furthermore, since there was nothing in evidence at that point, there was nothing that could possibly be considered independent proof connecting any defendant to any conspiracy.

Without looking at the documents before him in the courtroom, or considering defendants' detailed objections to them, Judge Wyzanski ruled:

> "The Court: I am satisfied from my examination of the documents that a prima facie case has been made for the admissibility on the conspiracy theory." (C4, R. 327)
>
> "The 307 exhibits, Exhibits 1 through 307 for Identification, inclusive are admitted in toto, in

accordance with the proffer. All objections are overruled." (C7, R. 329-30)

The remainder of the government's case was similarly offered and received in bulk without examination. It consisted of five stipulations, defendants' answers to certain interrogatories, and about 2,600 pages of transcripts excerpted from 38 depositions (C7-C9, C13, C25, R. 330, 331, 335, 345). Defendants had listed hundreds of objections to the latter which were marked as their Exhibit C for Identification but were not considered by the court (C16-C17, R. 338, 667; D. Ex. C for id., R. 4029-49). As counsel for the alarm companies was noting his objections,[20] the following colloquy took place:

"Mr. Fritz: As your Honor will note, and probably has not had an opportunity to note, counsel for the Government and ourselves have cooperated to have printed almost as a running text the excerpts from all of these depositions that have been offered.

"The Court. You would be surprised at how much I have noted, although in your arguments you have sometimes assumed that I do not note what is filed.

"Mr. Fritz. I really would not assume that, sir. It is just bulk that I thought——

"The Court: You had better make no assumptions as to the rate or quantity of work that I have done.

"Mr. Fritz: I hope your Honor will take my statement that I meant not the slightest offense or reflection.

"The Court: *I do regard your statements as both an offense and a reflection* at an earlier stage because they are based upon the assumption that I gained

[20] These and other objections made by any defendant were considered as having been made by all defendants (C17 R. 338).

information from some other source or other circumstances than by *your demand* that I should read these documents.[21]

"Mr. Fritz: May I——

"The Court: *You yourselves put on me the burden of forming an opinion and I did form one.*

"Mr. Fritz: May I respectfully say that I had no such intention in any comment I made to this Court.

"The Court: You have sometimes given the Court the impression that I acquired some idea of this case except from you and opposing counsel. I have no other idea.

"Mr. Fritz: I have purposely never intended to convey the slightest intimation of that to your Honor nor has it been in my mind at any time, and if I did so it was certainly an inadvertence, which I regret very much.

"The Court: You have made it quite plain to the country at large, or at least to this community, that you regarded me as having formed an opinion from some other way than a Judge ought to form an opinion.

"Mr. Fritz: Well, I don't think it becomes me to make any comment except to say that what I submitted to this Court I did on the basis of only two matters, two excerpts of hearings before this Court, one, May the 28th and one, June the 3rd, and they were presented in full.

"The Court: They did not tell the whole story because *over my strong reluctance* you insisted that I should hold a case in suspense so that you could

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[21] We have already noted the only "documents" filed with the court prior to the trial. These included plaintiff's trial brief, which described certain documents plaintiff intended to offer in evidence at the trial, but the court never identified that brief as the source of the "documents" to which it referred, nor had that brief been a part of plaintiff's submission for purposes of the pretrial conference on relief. Defendants did not have their trial briefs ready until well after the trial.

> confer about a possible settlement and that I could look at the papers with respect to the matter. *You, not I, created the difficulty.* Any Judge would properly resent being drawn into a situation as a trap and then have the door let loose.[22]
>
> "Mr. Fritz: Well, I don't think it would serve any useful purpose on my part certainly—your Honor seems to have strong convictions about that—but let me just close it by saying that for my part, and I am sure for Mr. McInerney's part, we came here suggesting the use of the Handbook Procedure in the utmost of good faith thinking it would be of help. Now we may have been mistaken in that but that was what our motivation was.
>
> "The Court: *You proceeded to disqualify two Judges* and sought to disqualify the third on the eve of a trial that had been postponed for nine months.
>
> "Mr. Fritz: The disqualification of the two prior Judges was purely voluntary on their part and had nothing to do with any of us.
>
> "Now with respect to the depositions that have been offered by the Government may I point out, as I was saying to your Honor * * *." (C13-C15, R. 335-36)

Judge Wyzanski overruled all of defendants' objections on the ground that there was no need to consider them until such time as he was required to draft his findings, conclusions and judgment, at which time he would only consider objections to such items as might be "likely to influence me" (C24, C25, R. 345). He commented:

> "To be sure, the making of such determination has some disadvantages for the defendants in that they cannot know whether something will or will not be excluded * * *.

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[22] As we have seen, instead of expressing "reluctance" the court had welcomed the suggestion of a pretrial conference on relief as "very helpful" (A9, R. 128).

> "The protection which the defendants will have is that they may be sure that on any vital matter in the case I shall not put in a mere summary method my findings, conclusions, or judgment but, where appropriate or necessary, *I shall key to particular documents or other exhibits or pages of the transcript such support as there may be for such findings, conclusions, or judgment as I enter.*" (C19, R. 340)[23]
> "I am not doubtful as to the general admissibility of the depositions as a whole. They are offered for particular points which it would take me a year to determine with a fine tooth comb, but *I have no intention of engaging in a fine tooth comb process* except where I finally decide that an item has such potential relevance and admissibility *as by some chance being likely to influence me.*" (C24, R. 345)

Having had all of its proffered evidence admitted in less than one hour after the trial commenced, the government rested (C25, R. 345).

Motions to Dismiss.

Counsel for the alarm companies asked if he could reserve the right to make motions addressed to plaintiff's case until the end of the whole case. When he was told: "I will allow you to reserve nothing" (C25, R. 345), he pointed out that, in view of the court's refusal to rule on defendants' objections, he did not know what was in the case at that moment (C25, R. 345).

Judge Wyzanski replied by asking how long defense counsel had been in possession of plaintiff's documents, and continued:

> "The Court: Six months at least?
> "Mr. Fritz: I would say so.

[23] This promise of protection was never fulfilled (R. 747-62).

"The Court: Thank you. I don't want any misrepresentation in any later court. I do not want it ever said that I did not give you adequate time to examine the testimony.

"Mr. Fritz: I didn't say that, your Honor.

"The Court: All right. I don't want any representations, because some representations made have given the impression—which is certainly not fair to this Court.

"Mr. Fritz: Well, I think your Honor is stating again what your Honor said earlier, and may I simply say again and with the utmost respect that nothing was said or done by me that was intended in any way to do anything else except to protect the interest of my defendants, and that's the only interest I have ever had, sir.

"The Court: Mr. Fritz, all that you have done is to say that a Judge who has evidence that came into the Court *necessarily was required to form an opinion, did form it* to the extent necessary to make rulings, and on that basis *you chose to file an affidavit of disqualification the character of which may be the character of you but not of me.*

"Mr. Fritz: I respectfully except to your Honor's comments. I think my character is not in question in this case.

"At this time I move to dismiss the complaint of the Government on the ground that it has failed to prove the cause of action purportedly pleaded therein or any other cause of action against my clients.

"The Court: Denied." (C26, R. 346)

A similar motion by Grinnell was also denied (C26-C27, R. 346-47).

Defendants' Case.

The alarm companies put their defense in first, amid numerous questions and comments from the bench addressed

to both witnesses (*e.g.*, C31-2, C44-C47, R. 374-75, 406-09) and counsel. Judge Wyzanski's running commentary again and again made it clear that he was not subject to persuasion, but instead considered the trial an exercise in completing the trial record in the shortest time possible so that this Court might review the result he had already reached. He stated in part:

> "* * * we are faced with an attitude of predicting how far out nine movable men moving to the left will move." (C30, R. 371)
>
> "Now, you, of course, are free to build the record hoping that some other more enlightened judge will have a more sympathetic view. I am not saying that in any other sense than telling you that *I know where I come out* not because I have, as has been suggested, a bias except that kind of bias which emanates from prior experience in this field, the kind of bias which constitutes judgment." (C33, R. 376)
>
> "The Court: Mr. Fritz, what do you gain by these leading questions and answers over an extended statement of ten pages in your brief about the great merits of this system? Do you think you will persuade me one bit more by this kind of testimony? Maybe you will persuade somebody else. And if you think so, all right. *I just assure you it is a great ceremonial act, as far as I am concerned.*" (C34, R. 377)
>
> "It is quite plain to anyone who is willing to look freely and without prejudice at the situation that the present majority of the Supreme Court of the United States, whether wisely or not, regards itself as a governor of the economy in terms which are exactly parallel to those which would be used by a department of economics in estimating situations." (C50, R. 428)
>
> "An antitrust case properly prepared can generally be presented in as brief a period of time as

> an automobile accident case—believe it or not—and the day will come when you will all see a resolute judge of the Supreme Court of the United States say exactly what I have said. Someone will have the courage." (C53, R. 446)
>
> "The Court: I said 'What harm does it do the Government'? *This is an exercise in trying to persuade Congress or five Justices of the Supreme Court but it won't have the slightest effect on me.*" (C54, R. 530)
>
> "I do not believe it makes the slightest bit of difference what is being shown in this case by both sets of counsel." (C55, R. 544)

During the examination of an ADT executive (not that of Mr. Fleming), the judge asked him to estimate what percentage of ADT's competition reports concerned companies which did not use automatic alarms. The witness said he had no way of making such an estimate, and defense counsel suggested reference to an exhibit. Judge Wyzanski replied, in his only reference to relief directed toward any individual until after both sides had rested:

> "I have no doubt that there are other sources. If I have to give relief in this case, I want to know about how fully informed the corporate officers are, and whether they should be by the corporation excluded from further employment on the ground of their failure adequately to follow the central business of the company and its degree of compliance with the antitrust laws. I hope I have made that so abundantly clear that you will not be surprised by any of the terms of the decree." (C65, R. 611)

The alarm companies called their remaining witnesses, and then rested.

Grinnell's defense was put in the following day. It consisted of the testimony of Grinnell's president, James Douglas Fleming, and certain exhibits. Judge Wyzanski interrupted this witness to compliment him profusely.

> "The Court: Mr. Fleming, I mean this as a compliment and not otherwise. I am deeply impressed with your familiarity with the company and your clarity of presentation and, if I may say so, your obvious strength of mind.
>
> "What I would like to know is whether you have any associates who, with all due modesty, you can tell me are comparable. For I have the very definite impression that if I ever saw a company which was in the control of one Napoleon, I am seeing it now.[24]
>
> "The Witness: I'm sorry——?
>
> "The Court: I have tried to be fair with you by telling you what impression you are making on me. You are making an impression on me of great strength and force of character, great intellectual ability, unparalleled by any other witness in this case. You have just testified that you as a Director sit on various Boards.
>
> "The Witness: That is correct, sir.
>
> "The Court: And I am trying to find out whether you have an associate who is in any way comparable to you in force of character and mind? And I know it is a very difficult question to put to you because I assume you to be a modest man. But I would like you to tell me whether I am mistaken in my view that you are without parallel in this company." (C86-C87, R. 691-92)
>
> "The Court: I hope you realize I do not mean anything adversely critical. On the contrary. *If I may say this without regarding myself as flattering you, the kind of quality that you have is rare and admirable.*

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[24] In contrast, the court's opinion describes Mr. Fleming as "not likely to be on anyone's list of Napoleons" (R. 763).

"The Witness: Well, I am 67 now, your Honor, and I will be 68 in December, and I hope I haven't been running things like Napoleon.

"The Court: No. The word Napoleon has, of course, a pejorative or unfavorable aspect. I did not mean that. What I meant was that kind of ability which rarely emerges but always carries with it command.

"The Witness: Thank you sir." (C89, R. 693)

Government counsel declined to cross-examine Mr. Fleming and, after he had left the courtroom, all parties rested (C91, R. 696, R. 697).

The court then announced its post-trial briefing and argument schedule, stating in part:

"Should I deal with the problem of relief I want you to be aware that I am thinking of possibilities more inclusive than those mentioned by the Government either in its complaint, or its briefs or in its presentation orally or otherwise.

* * * * * *

"* * * I may require the companies no longer to employ those who by their inattention failed to deter the companies who were in their charge from engaging in conduct violative of the laws of the Nation." (C92-C93, R. 697-98)

There was no suggestion at any time prior to the decree that Mr. Fleming might be banned from further employment by defendants; on the contrary, the court had lavished praise upon him. This comment was, therefore, taken as a reference to the ADT executive. Accordingly, while ADT's post-trial brief dealt with the question of the court's power to enter such a decree, Grinnell's brief did not refer to the subject at all.

The Opinion.

Judge Wyzanski's introduction to his opinion states in part that:

> "Few judges who have sat in such cases have attempted to digest the plethora of evidence." (R. 744)
>
> "* * * non-statutory monopolies * * * are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by §1 * * *." (R. 746)
>
> "To this Court it appears that the day has come for it, and more important for counsel, to proceed on the acknowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of §2 * * *." (R. 746)
>
> "If defendant does wish to go forward, it is free to do so and to maintain the burden of showing that its eminence is traceable to such highly respectable causes as superiority in means and methods which are 'honestly industrial', as Judge Hand characterized the supposititious socially desirable monopolizer."[25] (R. 746)

The findings of fact are not keyed to the evidence, as Judge Wyzanski stated they would be (C19, R. 340). Moreover, they frequently fail to identify the particular defendant or defendants to which the findings relate; instead, there appears to be a tacit assumption throughout that each defendant may be held responsible for any other defendant's acts.

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[25] At no time prior to the publication of this opinion were the defendants advised of the court's view that they had this burden of proof, nor was any such contention ever advanced by the government.

The court apparently considered the 1906 Burglar Alarm Agreement and the 1907 Fire Alarm Agreements as binding on all defendants, even those who were not parties to them. It found that by these agreements the alarm company defendants had "allocated geographic markets and classes of customers" until 1954, when the agreements lapsed and became "no longer legally effective" (Conclusion of Law, Finding 51a, R. 761, 758). Conclusion of Law 3 states:

> "Because of the formal expiration of the agreements, it, *conceivably,* might be too late for the Government now to seek against defendants relief from the legal instruments as such. But the folds in the industrial scene have remained even though the technical pressure of the legal instruments has been withdrawn." (R. 761, emphasis in original)

The court concluded that the alarm companies violated Sections 1 and 2 of the Sherman Act. There is no conclusion of law that Grinnell violated Section 1, but the last conclusion of law states:

> "Grinnell's acquisition of so high a percentage of stock of the companies engaged in the monopolization, and Grinnell's direction of the policies of the 4 companies as a whole toward the maintenance of the monopolization constituted a violation of Section 2." (R. 761-62)

The Decree.

In his "Opinion on Remedy", Judge Wyzanski stated that his decree would be a "three-pronged judgment" requiring:

> "First, defendants, including the controlling Grinnell Corporation, shall be specifically directed to cease and desist from restraints of trade in which

the record shows that the alarm companies have engaged directly or indirectly." (R. 765)

"* * * the alarm company defendants shall be required, until further order of the Court, to file with the Antitrust Division of the Department of Justice such *standard* lists of prices and terms of sale or servicing as, *at their uncontrolled pleasure,* they from time to time adopt, and also to file a record of every quotation, written or oral, departing from those standard lists, * * *." (R. 765, emphasis in original)

"The cease and desist order shall prohibit each defendant from acquiring the stock, assets, or business of enterprises in the accredited CSPS industry * * *." (R. 766)

"Second, no later than April 1, 1966 Grinnell shall file with this Court a plan of divestiture under which it shall dispose of all of its stock in each of the other defendant companies * * *." (R. 766)

"Third, * * * to make certain that the general public is not further prejudiced by the continued management of defendants by one who has demonstrated defiance of legal prohibitions, no defendant, after April 1, 1966, shall continue in employment as officer, director, employee, consultant, agent, or otherwise James Douglas Fleming * * *." (R. 766)

"* * * there is not intended in this decretal provision, or in any other part of this opinion and judgment any suggestion that Mr. Fleming lacks financial integrity or honesty of the usual type. He is an 'honest man' after the manner of Theodore Roosevelt or Norman Hapgood." (R. 767)

Post-Judgment Proceedings.

All parties, including the government, filed jurisdictional statements on April 19, 1965, and each waived its right to move to dismiss the other side's appeal in order that the statements might be distributed as early as possible. The Court noted probable jurisdiction on May 17,

1965 (R. 788), and the parties then stipulated the portions of the record to be printed.

In setting April 1, 1966 as the effective date for the divestiture provisions of his decree, Judge Wyzanski stated:

> "The date is purposely set far ahead to permit an appeal to the Supreme Court, and to let defendants consider all tax and corporate problems." (¶5, Opinion on Remedy, R. 766)

Because of the voluminous record here, it became apparent that it would not be possible to accomplish these purposes by that date despite the diligence of the parties in prosecuting these appeals. Accordingly, defendants requested the court below to stay the date for compliance with the provisions requiring Grinnell to file a plan of divestiture and enjoining all defendants from continuing to employ Mr. Fleming (paragraphs 3 and 4 of the judgment, R. 769) until six months from the date of this Court's decision. Government counsel consented to a stay until four months from that date, but Judge Wyzanski (in a letter to counsel dated October 26, 1965) stated that, while he was sympathetic to the motion for a stay, he doubted his power to act on it while these appeals were pending. Defendants then made their motion to Mr. Justice Fortas, who ruled on November 8, 1965:

> "While I am sympathetic with the request, so presented, for a stay, I do not believe that I, as an individual Justice of this Court, should extend it beyond the date of the judgment of this Court. If and as appropriate, provision for additional time may be considered by this Court in connection with its disposition of the case, or by the District Court upon remand." (86 S. Ct. 231)

In the event that this Court should permit any part of paragraphs 3 or 4 of the lower court's decree to stand, we respectfully renew our request that defendants be given at least six months to comply with it. We believe that six months is the minimum amount of time that would be required to consider the least burdensome way to accomplish any divestiture this Court may order, including any tax or corporate problems which may be raised thereby, or to select and train a successor or succesors for Mr. Fleming. However, we submit that it should not be necessary for the Court to consider this request because these paragraphs (as well as the remaining portions of the court's decree) should be vacated for the reasons stated below.

SUMMARY OF ARGUMENT.

The primary issue on these appeals is whether the trial judge's conduct of the proceedings below, from his announced prejudgment of this case to his severe decree, was such as to deprive defendants of their fundamental right to a fair trial.

In accordance with procedures recommended by the Judicial Conference of the United States for the trial of protracted cases, defense counsel suggested a pretrial conference on possible relief. Judge Wyzanski at first embraced that suggestion as "very helpful", but on the date set for the conference he refused to discuss the matter; instead, he abruptly advised the defendants that he had decided this case adversely to them. He never indicated how or why, although he thereafter attempted to justify his prejudgment by references to unidentified "documents" he had allegedly been "forced" to look at.

In pretrial proceedings, before anything had been offered or received in evidence, Judge Wyzanski told the defendants: "You would do better to get together with the Government rather than run the risk of what I would say" (A19, R. 256). Since government counsel were insisting on consent decree provisions exceeding the complaint's prayer for relief, this statement was a threat of disaster for defendants. As if to reinforce this threat with an ultimatum, on his own motion the trial judge peremptorily scheduled the trial for 18 days after the abortive pretrial conference on relief. He denied motions to extend this time and to clarify the relief issues, and in doing so again indicated his firm convictions by saying: "my views are more extreme than those of the Government" and "if I am required to make Findings and reach Conclusions I am opening up third-party suits * * * [with] the percentage of people involved [relatively] higher than in the electrical cases" (A31, R. 281-82).

Only then did defendants reluctantly and respectfully petition Judge Wyzanski to disqualify himself because of his announced prejudication of this case. At that juncture, another judge should have been assigned if only to satisfy the appearance of justice and to assure confidence in the impartiality of the tribunal as required by 28 U. S. C. §144. However, Judge Wyzanski refused to disqualify himself and insisted on presiding at the trial unless the Chief Judge of the First Circuit (then Judge Woodbury) intervened. When he refused to do so, the case went to trial in an atmosphere of haste and hostility.

Judge Wyzanski conducted the trial with a closed mind, and with frequent and flagrant disregard for defendants' rights. He told defendants' counsel that he regarded their disqualification request as "an offense and a reflection", that they were "free to build the record hoping that some other more enlightened judge will have a more sympathetic view", but "I know very well where I come out", and "I

just assure you it is a great ceremonial act, as far as I am concerned" (C14, C33-C34, R. 335, 376-7).

Judge Wyzanski's prejudgment is apparent not only from his own statements announcing it and attempting to justify it, but also in his rulings during the trial, in his findings and conclusions, and in his decree. At the outset, he invited plaintiff to offer all its evidence "in bulk", and received it in bulk without examining either its content or defendants' objections. He held that all documents offered were admissible against all defendants "on the conspiracy theory" when there was no independent evidence of a conspiracy or other foundation for such a ruling. Plaintiff's case was thus concluded within an hour.

Defendants were then allowed to "build the record", but the trial judge made it clear that he would not "hear the other side" in any meaningful sense and that their efforts would be futile.

As a result of this summary trial, the court's findings of fact embody erroneous propositions which were not even argued by any party. Although the findings correctly state that Grinnell is not in the central station business (Finding 17, R. 750) and that it purchased the alarm companies' stock for investment (Finding 18, R. 750), they also state (contrary to the incontestable facts) that Grinnell is the principal supplier of central station equipment to the alarm companies (Finding 17), and that its acquisition of their stock was "in part motivated by a desire to increase Grinnell's manufacturing business and to assure a quiet market as an outlet for the sale of Grinnell's alarms, sprinklers, and other equipment" (Finding 20, R. 751).

The court's conclusion that Grinnell and Mr. Fleming direct the operations of each of the alarm companies, "their company subdivisions, their district sales offices, and their personnel" (Finding 26, R. 753) is also clearly erroneous.

Instead of reflecting the evidence, these basic findings and conclusions reflect the court's steadfast refusal to "digest the plethora of evidence" (R. 744) or to examine its preconceptions. The uncontradicted testimony was that each of the alarm companies retained the same independent management after Grinnell invested in them, and that no Grinnell representative was ever employed by any of the alarm companies in any capacity other than as a director (C59, C85-C86, R. 577, 690-91). Moreover, Mr. Fleming testified that he could only recall one instance (and that one insignificant for present purposes) in which any proposal or plan of an *alarm company's* management had been overruled by its board of directors (C89, R. 693-94). Misconstruing that testimony, the court found: "In only one instance that Mr. Fleming could recall, has a board of directors of one of the affiliated defendants ever vetoed, or rescinded, or overridden any of *his or Grinnell's* management proposals or plans" (Finding 23, R. 752, emphasis added).

Still another basic error permeating the opinion of the trial court was its failure or refusal to consider the evidence against each defendant separately. Starting with the tacit assumption that any defendant may be held vicariously liable for the acts of all other defendants, the court concluded, for example, that all defendants are guilty of monopolizing because of ADT's acquisitions and deficit operations.

The final fruit of the trial court's bias and prejudice was its patently punitive "three-pronged decree". This is reminiscent of Judge Wyzanski's comment in pretrial proceedings that, under certain circumstances, he would be capable of "Draconian measures of great severity" (A9, R. 129). Each of these "prongs" would be unwarranted under any conceivable theory.

Even if we were to assume that Grinnell violated the Sherman Act, and that a judgment ordering some divestiture by Grinnell could be justified, there would still be no justification for divesting Grinnell of its investments in all three of the alarm companies and prohibiting it from any future central station acquisitions. The complaint does not attack any of Grinnell's acquisitions as such, nor does it request that Grinnell be divested of its interest in AFA or Holmes, and the court gave no indication as to why this wholesale divestiture might be necessary. The effect of the decree is to outlaw Grinnell from the allegedly relevant market when Grinnell is neither a competitor, nor a significant supplier or customer, in that market, and when its ownership of an alarm company's stock does not give either company any competitive advantage.

Under any view of the facts, plaintiff can obtain complete relief from any alleged violation of law by Grinnell by a partial divestiture—*i.e.*, divestiture of its investments in *either* ADT *or* AFA and Holmes. And such judicial restraint is particularly appropriate in this case because Grinnell made the last and largest of these investments (in ADT) in reliance on the Department of Justice's acquiescence in that transaction.

The second prong of this decree, the court's banishment of the witness Fleming from further employment in his life's work, is a wholly indefensible judicial act of attainder. This "relief" was not requested by the government or based on any evidence, and it violates the most rudimentary requirements of due process. Mr. Fleming was never a party to this action, or even named in the complaint; nor was he advised of any charges against him, or given any opportunity to answer any charges there might have been. Even if these essential prerequisites to

due process had been fulfilled, and even if the court had the power to impose such harsh "relief", it would still be improper here because there is no record support for the court's findings, conclusions and decree concerning this witness.

Nor was it consistent with first principles of fairness for the court below, as the third prong of its decree, to broadly enjoin all defendants from violating the antitrust laws under pain of contempt proceedings. This requires defendants and their employees to interpret such vague statutory language as "restraining trade" and "attempting to monopolize" at their peril, without any standards in the decree against which to test their conduct.

Each of the errors briefly described above was of itself prejudicial. The mosaic formed by all of them against the background of the pretrial proceedings herein presents a stark picture of judicial unfairness—a caricature of justice. These entire proceedings, from the trial court's announced pretrial prejudgment to the fulfillment of its threats in its draconian decree, were marked by denials of due process which require redress by this Court.

Defendants are at least entitled to a fair trial before a trier of the facts who is open to persuasion by evidence and arguments. Accordingly, this case should be remanded to the court below with instructions that the Chief Judge of the First Circuit be requested to assign a new judge for any further proceedings herein.

Since the interests of justice require a new trial regardless of the merits of plaintiff's case, further inquiry by this Court would ordinarily be unnecessary. However, there are additional questions raised by the decision below which we respectfully request the Court to consider now because

such consideration may result either in dismissal of the charges or in substantially shortening any retrial.

The first of these is the issue of whether the lower court's determination that Grinnell violated Section 1 of the Sherman Act can be sustained, quite apart from the above objections to it. The basis for this holding is unclear (because the court failed to make the supporting findings and conclusions required by Rule 52(a) of the Federal Rules of Civil Procedure) but it seems to have been based on the assumption that Grinnell may be held liable for certain "patterns of conduct" of the other defendants. Any attempt to hold Grinnell vicariously liable by ignoring the separate identities of these defendants, and the reality of their independent managements, cannot be reconciled with the facts of record.

Furthermore, there are neither findings nor proof that Grinnell knowingly participated in the conduct found illegal by the court below. The only findings of fact which might support the conspiracy charge relate to "patterns" allegedly resulting from the 1906 and 1907 Agreements, both of which had lapsed by 1954. The court acknowledged that it may be too late now for the government to obtain relief against these agreements "as such", but went on to find that they left "folds in the industrial scene" tantamount to allocations of territory and functions among the alarm companies.

In holding these patterns illegal, the court ignored the fact that for over a decade the three alarm companies had been subsidiaries of the same parent company (Grinnell) which owned enough stock in each of them to merge them all into a single enterprise without the consent of minority stockholders. Because of their common ownership, it would have been entirely reasonable for these subsidiaries (which have openly acknowledged their affiliation and have not

pretended to be strangers) to refrain from entering new markets or offering new services in competition with their already-established affiliates. Indeed, even if there had been a formal agreement among these affiliates that they would not compete with each other (and the court found that there was not), such a division of work within this corporate family would not have been an unreasonable restraint of the trade of either its members or third parties. *A fortiori,* the "patterns" which the court below detected in the alarm companies' operations cannot support its judgment that Grinnell violated Section 1. To hold otherwise would be to require companies under common control to compete among themselves or face civil and criminal liability under Section 1 of the Sherman Act. That, we submit, would be an absurd and far-reaching result.

The court's conclusion that Grinnell violated Section 2 by monopolizing a market in which it does not compete was based on three dependent premises, *each* constituting reversible error. In the first place, the court defined the relevant market incorrectly, focusing its entire attention on an artificial cross-section of various protection services; in doing so, it incorrectly assumed that the *Cellophane* case had been overruled and that there was no need to consider effectively competing substitute services for which there is a cross-elasticity of demand. Secondly, the court held that the alarm companies have such a preponderant share of that economically-unreal "market" that defendants had the burden of proving that they did not violate Section 2, even though it did not advise them of that burden until *after* the trial. Finally, in the same post-trial opinion in which the court announced this novel presumption of guilt, it converted the presumption into a conclusion that all defendants had violated Section 2 because of evidence properly admis-

sible against ADT only, and not probative of such a violation even as to ADT. On the contrary, the trial court expressly recognized that there was no persuasive evidence that defendants had power to exclude competition in central station protection services or to control their own prices, and these findings preclude a holding of monopolization.

In short, even if there had been a fair trial, the holdings that Grinnell violated Section 1 and Section 2 of the Sherman Act would have to be reversed for failure of proof, as well as the other reasons stated above, and these charges should, therefore, be dismissed.

Finally, in order to reduce the number of briefs filed, defendants have agreed to state at this time their position on plaintiff's appeal, *United States* v. *Grinnell Corporation, et al.*, No. 73. Since the judgment below must be reversed, and the complaint dismissed or a new trial ordered, it necessarily follows that the excessive decree entered below may not be expanded as plaintiff now asks. The briefs of the alarm company defendants deal with the additional items of relief sought which relate to their operations, and the further relief requested as to Grinnell is considered briefly here.

On the basis of alleged facts which are not in the record, which were not argued below, and which are inaccurate, plaintiff now claims that Grinnell should not be permitted to distribute alarm company stock to its over 5,000 shareholders as one method of accomplishing any divestiture that may be required. If the divestiture ordered below were permitted to stand, but this method of divestiture were prohibited, the result would be a severe tax burden (in the order of $20,000,000) on Grinnell itself, a further tax burden on its stockholders if any of the proceeds of the sales were distributed to them, and a severe limitation on Grinnell's ability to negotiate a sale to a third party at a

fair price (if Grinnell had no alternative to sale). No public interest would be served by imposing these burdens on defendant, or by so departing from the doctrine that a court of equity must act remedially and not punitively.

However, we respectfully submit that these "additional relief" issues need not be considered. Instead, we pray for a reversal and remand of the decision below, with such instructions for dismissal of these charges, or for a new trial, as this Court may deem just and proper.

ARGUMENT.

I.

DEFENDANTS DID NOT HAVE A FAIR TRIAL IN A FAIR TRIBUNAL. THEY ARE ENTITLED TO A NEW TRIAL BEFORE A NEW TRIER OF THE FACTS.

The proceedings below were not truly a trial but were instead, to borrow Judge Wyzanski's expressive phrase, "a great ceremonial act". We do not know precisely when (or how, or why) the court began to form its convictions which made the trial a ritual leading to a preordained result, but we do know that this prejudice had ripened into a complete prejudgment before the first item of evidence was offered or admitted.

The trial judge forcefully announced in pretrial proceedings that "my views are more extreme than those of the government" (A31, R. 281-82), and that the defendants would face treble damage actions relatively more serious than the *Electrical Equipment* cases "if I am required to make Findings and reach Conclusions" (A31, R. 281-82). In other words, he warned the defendants that, if they put him to the trouble of trying this lawsuit, after the formali-

ties, he would hold them guilty of violating the Sherman Act, on the basis of findings making them subject to substantial treble damage suits, and would enter a decree even more severe than plaintiff sought. He then gave defendants 18 days to "get together with the government" or feel "the impact of this Court" (A19, A20, R. 256-57).

These pretrial pronouncements may suggest that Judge Wyzanski was trying to force defendants to settle this case on plaintiff's terms, regardless of the relief requested in the complaint. But even during the trial, when settlement was clearly out of the question, he repeatedly indicated that his mind had been made up prior to trial and that the defense would be futile. Indeed, he insisted that his prejudgment of this case was not only proper but necessary, and he held defense counsel themselves responsible for their predicament. Ironically, he told them: "You yourselves put on me the burden of forming an opinion and I did form one", and "over my strong reluctance * * * You, not I, created the difficulty" (C14-C15, R. 336).

These comments, of course, refer to defendants' suggestion of a pretrial conference on relief, which the trial judge found "very helpful" at the time (A9, R. 128), but which he abruptly refused to hold thereafter. Defense counsel advanced that suggestion pursuant to the following recommendation made by a Judicial Conference Study Group on which Judge Wyzanski served; its report was adopted by the Judicial Conference of the United States in March of 1960, and is entitled *Handbook of Recommended Procedures for the Trial of Protracted Cases,* 25 F. R. D. 351, 398:

> "Recommendation: After discovery has been substantially completed, particularly in civil antitrust suits brought by the government, one or more

pre-trial conferences should be devoted to the question of the relief sought by the plaintiff.[26]

"Discussion: Frank discussion, for example, of the government's objectives in civil antitrust cases may aid the trial judge in appraising the relevance and—more important—the significance of the proofs when they are offered.

"There is a further advantage to be gained in discussions of relief. In civil antitrust litigation, where the government is the plaintiff, the case often proceeds to trial through lack of agreement as to (1) what relief would be appropriate were the allegations of the complaint proved in their entirety, or (2) what relief the government and the defendants would be willing to accept in a consent decree. Discussion of these matters at pre-trial conferences may serve to dispose of the case without trial. Although judges should be very circumspect in their efforts to persuade the litigants to settle, they need not sit by helplessly as the case moves inexorably toward protracted trial, where there is sound reason to believe that a calm discussion of the government's objectives may lead to a resolution of the differences between the parties in advance of trial. The same principles apply to other big cases where equitable relief is the principal issue."

In proposing that the trial court follow this recommendation, defense counsel acknowledged that the court would have to assume that defendants would be found liable in order to consider what relief would then be appropriate (A6, R. 126), and they cited the *West Coast Oil* case to which

[26] The "Handbook" contains the following footnote:

"A somewhat comparable suggestion was made in the 1954 ABA Committee Report, pp. 21-22. Concentration in the pre-trial stages on the question of relief ultimately led to settlement of the West Coast Oil case. Cf. U. S. *v.* Standard Oil Company of California, et al., Trade Reg. Rep. (1958 Trade Cas.), ¶ 69,212 (S. D. Cal. 1958)."

the Judicial Conference Handbook referred to support this procedure. There, the district court carefully distinguished between this temporary assumption, not based on any judicial examination of the merits, and what the court's views might be after a trial. On that basis, it considered facts pertaining to relief (most of which were not in dispute) in open court for three and a half days, and then announced certain tentative views on relief which formed the basis for a settlement.

Judge Wyzanski well understood that the proposal was "really an invitation to the Court to participate in a discussion of relief *without addressing itself to the merits*" (A6, R. 126). He overruled the government's objection to such a discussion, and entered an order for a pretrial conference "for the primary purpose of discussing the relief which would be appropriate in the event plaintiff prevails" (A14, R. 134).

At that stage, defendants had no reason to believe that this assumption *arguendo* might be converted into an unalterable conclusion of guilt by reason of a *sua sponte* evaluation of "documents" or by any other means.[27]

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[27] On the contrary, as Grinnell stated in its petition requesting Judge Wyzanski to disqualify himself:

> "On April 6, 1964, the defendants submitted briefs on relief and proposed changes in plaintiff's proposed form of judgment. In doing so, defendants expressly restated their understanding of the procedure to be followed (*i.e.*, that there would be an *arguendo* assumption that plaintiff could establish a case) and implicitly demonstrated their confidence in the Court's ability to consider the relief aspects of this case without pre-judging its merits." (B2, R. 294)

> "Our understanding of that procedure was that the Court would assume liability on defendants' part, but *only* for the purposes of pretrial discussions looking toward obtaining a tentative indication from the Court of the relief that would then be appropriate. Instead, it now appears that the Court has concluded that any trial of this case will result in a finding of liability." (B5, R. 297)

Indeed, the court gave no intimation of any such procedure until *after* it had announced its prejudgment, and it did not identify the "documents" it had consulted even then.

While the defendants never contemplated that the court would judge the merits of the case in this *ex parte* manner, that is what happened if, as the trial judge claimed, his prejudgment resulted from examining "documents" (C4, R. 327) before the trial commenced. His statements during the trial (and after the motions to disqualify) that he had received "evidence" in pretrial proceedings from which he "necessarily was required to form an opinion" (C26, R. 346) were simply incorrect.

Judge Wyzanski made these statements in blaming defendants' counsel for his prejudgment, and branding their disqualification motions "an offense and a reflection" (C14, R. 335), which "Any Judge would properly resent" (C15, R. 336). At the same time, he accused them of having "proceeded to disqualify two other judges" and of seeking his disqualification in order to postpone the trial (C15, R. 336). As to this, we confine our comments to pointing out (as defense counsel pointed out to the court below) that the only "two other judges" disqualified themselves on their own motion, without any request from any party, and that defendants acted in complete good faith in suggesting the Handbook procedure and in making the only disqualification motion they ever made (*ibid.;* R. 77; B1-B7, R. 293-99).

A. The Trial Judge Was Disqualified By His Prejudgment Of This Case.

It is fundamental to our system of justice that, "no matter what the evidence against him", a litigant has "the right to an impartial judge". *Tumey* v. *Ohio,* 273 U. S. 510, 535 (1927). As this Court recently restated in *Holt* v. *Virginia,* 381 U. S. 131, 136 (1965), citing *In re Murchison,* 349 U. S. 133, 136 (1955): "A fair trial in a fair tribunal is a basic requirement of due process". It would seem obvious by definition that an unbiased judge is absolutely essential to this basic requirement of due process.

Indeed, this Court has repeatedly stated that the tribunals of this country should not only *be* impartial but should "give assurance that they are impartial", *Berger* v. *United States,* 255 U. S. 22, 35 (1921), and that "justice must satisfy the appearance of justice", *Offutt* v. *United States,* 348 U. S. 11, 14 (1954). Surely the appearance of justice requires, at a minimum, that the trier of the facts should not form his judgment *ex parte* but must instead "hear the other side" before judging the merits.[28] If he is incapable of giving an impartial hearing, at least to the extent of being subject to persuasion, it is his duty to disqualify himself instead of insisting on presiding at the trial.

The requirement that federal trial judges must be unbiased and impartial has been codified, in the section of

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[28] *Audi alteram partem.* Broom's Legal Maxims, pp. 112-15 (7th ed., 1874), and cases there cited. This right to be heard by the trier of fact is rooted deeply in the English common law. As early as *Bagg's Case,* 11 Coke's Rep. 93b (1615), the King's Bench ordered a magistrate restored to office after his fellow magistrates had removed him without "hearing him answer to what was objected" (at p. 99c). See also, *Rex* v. *Benn,* 6 T. R. 198 (1795); *Capel* v. *Child,* 2 C. & J. 558 (1832), and *Regina* v. *Archbishop of Canterbury,* 1 E. & E. 545 (1859).

the Judicial Code under which defendants moved here,[29] the basic provisions of which were interpreted in *Berger* v. *United States, supra.* There, defendants filed an affidavit that the trial judge had, in another action, shown prejudice against defendants' nationality. This Court held that his refusal to disqualify himself was reversible error in an opinion by Mr. Justice McKenna, stating in part:

> "We are of opinion, therefore, that an affidavit upon information and belief satisfies the section and that upon its filing, if it show the objectionable inclination or disposition of the judge, which we have said is an essential condition, it is his duty to 'proceed no further' in the case. And in this there is no serious detriment to the administration of justice nor inconvenience worthy of mention, for of what concern is it to a judge to preside in a particular case; of what concern to other parties to have him so preside • • •.
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> "• • • Nor is it our function to approve or disapprove [the statute], but, we may say, that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any 'bias or prejudice' that might disturb the normal course of impartial judgment. And to accomplish this end the section withdraws from the presiding judge a decision upon the truth of the matters alleged. • • •

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[29] 28 U. S. C. §144, which provides:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
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> "• • • a party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

> "• • • Judge Landis had no lawful right or power to preside as judge on the trial of defendants upon the indictment." (pp. 35-36)

We respectfully submit that defendants' affidavits here were equally sufficient under the statute, and for that reason alone Judge Wyzanski had no right to proceed further in this case.[30]

Even apart from the statute, of course, a fair trial requires an unbiased trier of the facts. This Court has most frequently considered the question in reviewing findings of contempt made by the very trial court in which the alleged offense was committed. These cases recognize that a trial judge must have the right to summarily punish contempts in order to preserve the orderly administration of justice. However, they also recognize that the defendant has a corresponding right to a fair trial by an "unbiased and impartial" judge who does not have "a constitutionally disqualifying prejudgment of guilt".[31] The most recent of these cases is *Harris* v. *United States,* 85 Sup. Ct. 352 (Dec. 6, 1965), where the majority held that summary punishment for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure must be reserved for exceptional circumstances and that the Rule 42(b) procedure,

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[30] Grinnell's affidavit and Judge Wyzanski's response are reprinted as Appendix B.

[31] *Ungar* v. *Sarafite,* 376 U. S. 575, 584-88 (1964). There, the majority held that the trial judge, a justice of the Supreme Court of the State of New York, was not biased in fact and did not give "an appearance of bias". However, it did not disagree with the dissenting opinion's view that it is a "travesty on American justice to allow a judge who has announced his decision on the issue of guilt prior to the trial to sit in judgment at the trial" (376 U. S. at 601). See also, *Offutt* v. *United States,* 348 U. S. 11, 18 (1954).

requiring notice and an opportunity to be heard, must be followed in the normal case.[32]

This case, on the other hand, involves no charge of contempt and requires no nice balancing of the rights of litigants against concern for orderly trial procedures. The plain facts here demonstrate an announced prejudgment of all phases of this case going far beyond expressions held to have disqualified courts and administrative bodies in other cases.

For example, in *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754 (D. C. Cir. 1964), *rev'd on other grounds*, 381 U. S. 739 (1965), FTC Chairman Dixon gave a speech to members of the oil industry which was held to have disqualified him and to have nullified a subsequent hearing before the full Federal Trade Commission under basic principles of due process.[33] Comparing that speech (made

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[32] Rule 42(b) provides in part:

"If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent."

[33] He said in part:

"We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases. • • •

"Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal. You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry." (336 F. 2d at 759)

The Court of Appeals held:

"In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that *he had in some measure decided in advance* that Texaco had violated the Act." (at 760, emphasis added)

This Court did not review that ruling but, in remanding the case to the Commission for further findings, noted that Chairman Dixon should not participate.

by one member of an administrative agency, whose members are irreplaceable when disqualified) with the pronouncements of the trial court here, *a fortiori* Judge Wyzanski was disqualified.

Less prejudicial statements than those made here were also held to disqualify the trial judge in *Connelly* v. *United States District Court,* 191 F. 2d 692 (9th Cir. 1951), where the charge was organizing a local Communist party for the purpose of conspiring to overthrow the government. Before his appointment to the bench, the trial judge there had stated it was his belief that the Communist party was an illegal conspiracy to overthrow the government. He was friendly with defendant's counsel, and told him prior to the trial: "I am sorry to see you getting mixed up with the Commies. They're just trying to use you." The Ninth Circuit, citing this Court's opinion in *Berger* v. *United States, supra,* held the trial judge was disqualified because:

> "It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality. Here we find the respondent judge, in the presence of another attorney, deprecating the action of petitioner's attorney, Marshall, an able member of the bar of this court, for defending petitioner, having the presumption of innocence of the charge which that officer of this court has devoted his proper professional services to resist." (p. 697)

There certainly was not "such an atmosphere about the proceedings" below that those present at the trial were given "the 'assurance' of fairness and impartiality". On the contrary, during the trial the judge was at pains to point out that he was beyond persuasion by anything or

anyone.[34] He expressed his resentment at defendants' request that he disqualify himself; he told them they were free to "build the record" for a "more enlightened tribunal" to evaluate, but he reminded them "I know very well where I come out", and he expedited the outcome by such short-cuts as receiving evidence en masse and indiscriminately as to all defendants.

In short, the atmosphere in the courtroom below was one of hostility and haste, rather than fairness and impartiality, and it obviously had a negative effect on the presentation of defendants' case.

Whether due process has been denied by reason of the atmosphere in the courtroom is frequently a subtle issue.[35] But not so here. This case presents a picture of basic unfairness similar to that condemned in *Knapp* v. *Kinsey*, 232 F. 2d 458, 466 (6th Cir.), *rehearing denied*, 235 F. 2d 129, *cert. denied*, 352 U. S. 892 (1956), where the Court of Appeals wrote:

> "When the remarks of the judge during the course of a trial, or his manner of handling the trial, clearly indicate a hostility to one of the parties, *or an unwarranted prejudgment of the merits of the case*, or an alignment on the part of the Court with one of the parties for the purpose of furthering or supporting the contentions of such party, the judge indicates, whether consciously or not, a personal bias and prejudice which renders invalid any resulting

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[34] The language used by the Supreme Court of Vermont in a leading decision, *Leonard* v. *Willcox*, 101 Vt. 195, 142 Atl. 762 (1928), is apropos here:

> "*A litigant ought not to be compelled to submit to a judge who has already confessedly prejudged him*, and who is candid enough to announce his decision in advance, and his serious doubt that he would do otherwise than adhere to it, no matter what the evidence might be." (142 Atl. at p. 772, emphasis added)

[35] See, *e. g.*, *Estes* v. *Texas*, 381 U. S. 532 (1965), on the use of cameras in courts.

judgment in favor of the party so favored." (Emphasis added)

See also, *Moskun* v. *United States*, 143 F. 2d 129 (6th Cir. 1944); and *Whitaker* v. *McLean*, 118 F. 2d 596 (D. C. Cir. 1941).

Here there was not merely an atmosphere of hostility, or even of prejudice more concrete. There was not merely a failure to satisfy the appearance of justice, but a perversion of the processes of justice into a ceremonial act.

In these circumstances, no further inquiry should be necessary. A new trial is required, unless the complaint is dismissed for the reasons stated hereafter, for nothing short of a new trial can remedy this clear denial of due process.

B. The Trial Court's Prejudgment Resulted In Other Prejudicial Errors.

We have already seen that the lower court violated the fundamental principle that, in Webster's words, the law of this land is "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial".[36] It should, therefore, be unnecessary for defendants to go further and prove that the trial court's closed mind caused prejudicial error in particular rulings. But the record here in fact contains such errors in abundance.

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[36] In his argument to this Court in *Dartmouth College* v. *Woodward*, 17 U. S. (4 Wheat.) 517 (1819), he said in part:

> "By the law of the land is most clearly intended, the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society." 7 Webster's Works, Vol. 5, p. 487, 6th Ed. (Little, Brown and Company 1853).

(i) The Court's Admission Of All Proffered Evidence Against All Defendants Indiscriminately Was Prejudicial Error.

To begin with, the court's admission of plaintiff's proffered evidence against all defendants en masse, and its refusal to examine defendants' objections, was erroneous. This expedited the trial to the extent that plaintiff's case (the entire trial transcript of which is reproduced at C2 to C25 of Appendix C hereto) took less than one hour, but it resulted in the court's improperly taxing Grinnell with exhibits which were inadmissible as to Grinnell. This is, we submit, an extreme example of the approach to conspiracy cases condemned in *Kotteakos* v. *United States*, 328 U. S. 750, 772 (1946), where the Court stressed that "Guilt with us remains individual and personal even as respects conspiracies. It is not a matter of mass application."

In accepting plaintiff's case en masse, the trial judge agreed that this procedure "has some disadvantages for the defendants", but he stated that their rights would be protected because "they may be sure that * * * where appropriate or necessary, I shall key to particular documents or other exhibits or pages of the transcript such support as there may be for such findings, conclusions, or judgment as I enter" (C19, R. 340). In sharp contrast to this commitment, the court's findings and conclusions are keyed more to literary allusion and allegory than to any evidence in this case. For that very reason, it is virtually impossible to point out each item of evidence improperly considered by the court.

One glaring example, however, is the 1906 Burglar Alarm Agreement between ADT and Holmes (Finding 52, R. 758-59). Grinnell was never a party to that agreement; it terminated in 1947, before Grinnell had any interest in

either of the parties to it (D. Ex. E52, E53, R. 4561-62, 496), and there is no evidence that Grinnell even knew of its existence. Still it was admitted in evidence against all defendants (along with all of the government's offered exhibits) and the court's decision refers to it in findings of fact and conclusions of law affecting all defendants (Finding 51a, Conclusions 2, 3; R. 758, 760-61).

Without looking at any of the documents before him in the courtroom, the trial judge immediately overruled all objections to this procedure, including the objection that documents admissible against one defendant were not *ipso facto* admissible against all other defendants; as to this, Judge Wyzanski ruled:

> "I am satisfied from my examination of the documents that a *prima facie* case has been made for the admissibility on the conspiracy theory." (C4, R. 327; emphasis added)

There was not a single item of evidence admitted at that time, and so there was nothing that could conceivably serve as independent evidence of any defendant's connection to any conspiracy, which is the requisite foundation for such a ruling. *Krulewitch* v. *United States*, 336 U. S. 440 (1949).

Brushing aside all such protestations, the trial judge admitted everything on the following wholesale basis:

> "The 307 exhibits, Exhibits 1 to 307 for Identification, inclusive, are admitted in toto, in accordance with the proffer. All objections are overruled." (C7, R. 329-30)

He then followed a similar procedure with respect to the government's proffered deposition testimony (C25, R. 345).

While he expressly refused to consider defendants' objections at the trial, Judge Wyzanski did indicate that

he might thereafter rule on objections to exhibits having such importance "as by some chance being likely to influence me" (C24, R. 345). However, there is no indication that he ever considered them. He never explained how, for example, the 1906 Burglar Alarm Agreement, or internal alarm company documents never sent to Grinnell, were admissible against Grinnell on any theory; or how a "lapsed" agreement between two defendants which is "no longer legally effective" is probative of a present conspiracy among all defendants.

This indiscriminate application of all offered evidence to all defendants was prejudicial error, but this error was merely one symptom of the trial judge's haste to conclude these proceedings. That attitude caused still other errors discussed below, all of which were the natural result of his predetermination of this case prior to hearing any evidence, and of his refusal to truly hear the evidence when it was presented.

(ii) The Court's Most Basic Findings Concerning Grinnell's Business Are Clearly Erroneous.

With the result predetermined, it is understandable that Judge Wyzanski refused to "digest the plethora of evidence" (R. 744) and so misapprehended the most basic facts concerning the business of the parties. We have already seen, for instance, that the alarm companies do not purchase or install sprinklers as part of their central station business (although ADT and AFA do offer SS&WFA services which supplement existing sprinkler protection) and that Grinnell has never been the "principal supplier" of equipment or machinery used in the central station business (although it supplied ADT and AFA with SS&WFA actuating devices before it discontinued making them). Yet the trial court made a series of sweeping and clearly erro-

neous findings to the contrary.[37] From these basic "facts", it further found that Grinnell acquired stock in the alarm companies to assure outlets for Grinnell's manufactured products. These findings, in turn, obviously affected the court's conclusions on both liability and relief to Grinnell's prejudice.

The plain truth is that Grinnell's sprinklers are not sold to, nor are they distributed through, the alarm company defendants. They are instead sold and installed by Grinnell's own organization, mostly in areas which are not even within reach of a central station (C81, C82, R. 671). Further, Grinnell is so far from being the principal supplier of the alarm companies that it has never supplied anything to Holmes, and is in no way a significant supplier of ADT or AFA.[38]

The findings that Grinnell is the "principal supplier" of the dominant central station companies are not based on either evidence or argument. Still they are the point of departure from which the court went on to find that, while "investment purposes" were one motive Grinnell had for acquiring stock in the other defendants (Finding 18, R. 750) and while motivation findings are unnecessary (Findings 19-20, R. 750-51), nevertheless:

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[37] For example, it found that in 1960 the alarm company defendants installed $12,000,000 worth of protection equipment which was "presumably" overwhelmingly manufactured by Grinnell (Finding 15, R. 750), and that:

> "Grinnell, which is not in that [central station] business, nonetheless manufactures the alarms, sprinklers, and other equipment which may be denominated the machinery of the business. It is the principal supplier of the dominant companies in the market." (Finding 17, R. 750)

[38] Even before 1961, Grinnell supplied only one part (the actuating devices) of the equipment used in rendering SS&WFA services. ADT supplied the other equipment installed on the subscriber's premises, and *all* of the central station equipment. Total SS&WFA revenues are less than 30% of ADT's revenues (C82, R. 672).

> "Grinnell * * * is possessed by what the mediaevalists called 'the lust for power'. No doubt, that lust is often in modern times characterized by * * * the search for * * * outlets for manufactured products. Here it is indeed probable that Grinnell's and its president's acquisition of leverage over the market for accredited CSPS was in part motivated by a desire to increase Grinnell's manufacturing business and to assure a quiet market as an outlet for the sale of Grinnell's alarms, sprinklers, and other equipment." (Finding 20, R. 751)

These conclusions are, of course, premised on the court's patent misconceptions of Grinnell's business, and are even more clearly erroneous.

(iii) The Court Erroneously Concluded That Grinnell Dominates The Operations Of The Other Defendants.

We do not propose to burden the Court with a complete catalogue of all of the factual mistakes in the opinion below, but chief among them is the notion that Grinnell directed the operations of the other defendants. Even though each defendant "had separate officers, and separate boards of directors which have independent identity", the court found, "the form is not a true mirror of the substance of the interrelation of the 4 companies" (Finding 21, R. 751). That conclusion is founded on a series of errors (contained in Findings 21 through 26, R. 751-53, and reviewed below) which again can only have resulted from failure to "hear" the evidence.

In the first of these findings, the court found it significant that:

> "Since 1919 the balance sheets of Grinnell, submitted as part of Grinnell's report to its stockholders, have

> shown, though in unconsolidated form, the results of operations of all 4 defendants." (Finding 21a, R. 751)

The facts are that Grinnell has reported income from these subsidiaries to its stockholders only since 1949 (the year it first acquired stock in any of them) and that it has done so in unconsolidated form because they "are carried on our balance sheet as merely an investment" in a "foreign line of business" (C80, C81, R. 669). These facts only reaffirm the independent existence of these subsidiaries.

The court then noted that Grinnell's president, James Douglas Fleming, is a director of each of the defendants, and that he is a man "whose competence, character, and force of leadership stand revealed throughout the whole record, and most particularly in the testimony he candidly gave in open court" (Finding 22, R. 751-52). Finding 23 states:

> "In only one instance that Mr. Fleming could recall, has a board of directors of one of the affiliated defendants ever vetoed, or rescinded, or overridden any of *his or Grinnell's* management proposals or plans. In all major operations of all 4 defendants Mr. Fleming has illustrated the Emersonian proverb that 'where MacDonald [or, as misquoted in the record (Tr. 732) MacGregor] sits, is the head of the table.' " (Finding 23, R. 752; emphasis added, bracketed material in original)

Mr. Fleming testified precisely to the contrary, but apparently he was misunderstood by the court. Following Judge Wyzanski's discourse on Mr. Fleming's Napoleonic virtues, Grinnell's attorney asked him:

> "Q. I would like to ask you one further question in connection with this. Since you and the other Grinnell men have been sitting on the Boards of Directors of these companies, do you recall any

> instance where the Board of Directors has vetoed or rescinded or over-ridden any management proposal or plan? A. We had one instance in ADT. It was a question of whether ADT was to go ahead with a central station in Paris, France. Mr. O'Brien [president of ADT] and Mr. McDonald [first vice president of ADT] voted against it. Mr. Gaston [retired president of ADT] and the rest of the Directors voted for it. And we are going ahead with it as rapidly as possible. But that is the only instance that I know of." (C89, R. 693-94; bracketed material added)

This instance that Mr. Fleming recalled was one in which the board of ADT overruled the position of Messrs. O'Brien and McDonald, who were ADT's principal officers and have never been employed by Grinnell. Thus it is clear that Mr. Fleming properly understood the question as calling for any instances in which an alarm company's management was overruled by its board of directors (on which he and other Grinnell executives sat). His answer was there was only one, which did not concern operations in this country.

That answer was consistent with all of the other testimony on this subject. Mr. Fleming had testified previously that Grinnell's alarm company subsidiaries were operated independently of Grinnell, that this was true in part because of the minority stock interests in AFA and ADT (C84-C86, R. 684, 690-91), and that "• • • I do not take any part whatsoever in the management of any of those companies. I don't know the central station business, your Honor" (C88, R. 693). This testimony was confirmed by Mr. McDonald of ADT (C59, R. 577), and both witnesses were uncontradicted. With that background, it is difficult to see how the trial court could have turned inside out the Fleming testimony quoted above.

The findings continue:

> "The personal unity achieved through the dominant character of Mr. Fleming is buttressed in many ways. Under allocation agreements, executed in 1907, Grinnell as late as 1960 received over $1,200,000 from revenue produced by contracts made by its affiliates * * *". (Finding 24, R. 752)

We have already seen that these 1907 agreements provided that Grinnell would furnish ADT and AFA certain SS& WFA actuating devices for 25% of the resulting revenues, they did not involve Holmes at all, and they had neither the purpose nor the effect of giving Grinnell control of the operations of the other defendants. Moreover, they were found to have lapsed and terminated in 1954 (Finding 51(a), R. 758; Conclusions of Law 2, R. 761). The court's $1,200,000 figure appears to be part of the purchase price under the Device Sale Agreement, whereby Grinnell sold to ADT all the Grinnell-owned actuating devices it had installed in ADT subscribers' premises over the years starting in 1907 and ending in 1954 (GX 316, R. 2346, 331).

Finding 25 states:

> "Moreover, there is a generic similarity, though not an identity, in the contract forms, price lists, and instruction forms used by the 3 alarm company defendants." (R. 752)

Even if there were a generic similarity of forms among companies in similar lines of business, that would surely not prove dominance by Grinnell of their operations. But the fact is that there is a great dissimilarity among these affiliated companies' various forms, which is further evidence of their autonomy.[39]

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[39] Compare GX 298, 307, R. 2199, 2229, 327 and D. Ex. Z1-Z5, R. 3667, 522.

The court then found that:

> "Travel from one state to another * * * as well as the written communications produce a high degree of integration of the major policies of the 3 alarm company defendants, and results in effective control by Grinnell and by Mr. Fleming of all 4 defendants, their company subdivisions, their district sales offices, and their personnel." (Finding 26, R. 752-53)

While each defendant undoubtedly sends documents and personnel across state lines, these movements are on each defendant's intra-corporate affairs, and they lend no support to the conclusion that the policies of all the alarm companies are integrated, much less dominated by Grinnell. On the contrary, each of the alarm companies kept its own separate management and policies after Grinnell's acquisition of it (C59, C84-C86, C88; R. 577, 687, 688, 690, 692-93).

Finally, summing up the foregoing findings, Judge Wyzanski referred to a "close articulation of control from the pinnacle of Mr. Fleming down the whole range of subordinate officers" of the alarm companies (Finding 39, R. 755), citing no evidence for that statement.

Curiously, of this host of plainly erroneous findings, none was suggested by the government. Although government counsel did emphasize that Grinnell controlled the other defendants by reason of its ownership of their stock, these findings are all products of the trial judge's speculation; and, as we have seen, they are so far from being supported by the evidence that the only relevant evidence is to the contrary.

These findings are further proof of specific prejudicial error—if any such specification of error be necessary when it was clear at the outset that the trial court prejudged all aspects of this case against defendants.

In less compelling circumstances, appellate courts have not hesitated to undertake "a careful reading of the record" to determine the probability of bias or prejudice. *United States* v. *Drumm*, 329 F. 2d 109, 114 (1st Cir. 1964). But no more detailed review of this record is necessary. The few examples we have selected illustrate how, having announced its conclusions prior to the trial, the court below was incapable of giving defendants a judicial hearing, and in fact gave them no real hearing at all.

C. The Trial Court's Decree Is Unjustifiable Under Any View Of The Facts.

We have already seen that Judge Wyzanski refused to hold the scheduled pretrial hearing on relief, and instead advised defendants to capitulate to the government because his views on relief (which he refused to disclose at that time) were "more extreme than those of the government". During the trial, the court again advised counsel that it had no intention of holding a separate hearing on relief but would instead hand down its findings, conclusions, opinion and decree all at the same time (C58, C92, R. 571, 697-98). Now that it has done so, all parties, including the government, contend that its decree is inappropriate.

While it is our position that no decree should have been entered against Grinnell (for the reasons stated in Points II and III below) we maintain that, even if Grinnell had violated the Sherman Act, each part of Judge Wyzanski's "three-pronged" decree would still be patently punitive and unreasonable because it:

(i) Prohibits the further employment of the witness James Douglas Fleming by any of the defendants—thus banishing one who is not even a party to this action from the further pursuit of his life's work.

(ii) Divests Grinnell of all three of its alarm company subsidiaries, and prohibits it from further investments or acquisitions in the central station business — thus effectively excluding Grinnell from investing or competing in the allegedly relevant market.

(iii) Bans defendants, and all acting on behalf of any of them, from "restraining trade" or "attempting to monopolize" — thus putting defendants and their employees in peril of a contempt citation if they incorrectly interpret this vague statutory language.

Each of these provisions constitutes a flagrant abuse of the trial court's discretion, and further demonstrates that the court did not base its judgment on either the evidence or reason but acted arbitrarily. These are the final harsh touches on the grotesque which has emerged from the proceedings below. Viewed in the context of the court's pretrial pronouncements, they are a parody of the precept that a court of equity must act remedially and not punitively.

(i) The Decree Improperly Prohibits The Witness Fleming From Pursuing His Life's Work.

James Douglas Fleming is not a party to this action, nor is he even mentioned in the complaint (which seeks no relief affecting any person's employment). Instead, he was a witness whose testimony the court found candid (Finding 22, R. 751-52) and whose character it described as "admirable" (C89, R. 693).[40] He began his career with Grinnell as a sprinkler fitter's helper in a subsidiary company after

[40] Judge Wyzanski commended his honesty and ability both during the trial and in his opinion. He stated in part:

> "[t]here is not intended * * * in any * * * part of this opinion and judgment any suggestion that Mr. Fleming lacks financial integrity or honesty of the usual type. He is an 'honest man' after the manner of Theodore Roosevelt or Norman Hapgood * * *." (¶6, Opinion on Remedy, R. 767)

he was discharged from the Navy in 1919 (C80, R. 668). For almost 30 years, he worked in various other capacities until he finally became president of Grinnell some 17 years ago (R. 751). He continues to devote full time to that office, and he has served Grinnell and its stockholders with dignity and distinction.

Despite the trial judge's lavish praise of Mr. Fleming, and despite the fact that at no time was any prior notice given of the possibility of any decretal provision affecting him, the court below gratuitously and incongruously enjoined his continuance in his life's work, and inaccurately stated that it had given "full notice" that it contemplated entering such a decree on the day Mr. Fleming testified (R. 766). On the contrary, Judge Wyzanski's remarks on that day expressed such a high regard for Mr. Fleming that if the court had any such "relief" in mind, these comments can only be interpreted as misleading.[41] Then, without giving him or them any prior notice or opportunity to be heard, the court decreed that Mr. Fleming should be deprived of the right to pursue his chosen occupation, and that defendants and their stockholders should be deprived of his services.

The right to pursue one's chosen occupation "is a large ingredient in the civil liberty of the citizen", *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589 (1897), *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 762 (1884), and not a "matter of grace and favor", *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 102 (1963), *Ex Parte Garland,* 71 U. S. (4 Wall.) 333, 379 (1866). Moreover,

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[41] It is true that, after Mr. Fleming had left the courtroom and all parties had rested, Judge Wyzanski remarked that he might require the defendants not to employ persons who by inattention had failed to deter antitrust violations (C92, C93, R. 697-98), but he did nothing to suggest that Mr. Fleming, or anyone other than the ADT executive already mentioned, might be in this category.

> "• • • the right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene* v. *McElroy*, 360 U. S. 474, 492 (1959).
>
> "• • • in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Ibid.* at p. 508.

See also, *Truax* v. *Raich*, 239 U. S. 33, 41 (1915), and 2 Fletcher, *Cyclopedia of Corporations* (1954 Rev. Vol.) §358, p. 166.

Here, there is no statute that was or could have been invoked by the court, although legislation proposed in the aftermath of the *Electrical Equipment* convictions is of interest in this connection. These proposals would have amended the Sherman Act to authorize district courts to suspend corporate officers individually convicted of criminal violations for periods of up to one year to prevent further violations.[42] Assistant Attorney General Loevinger, who was then in charge of the Antitrust Division, recommended that the applicability of any such bill be limited "to convictions for offenses occurring after enactment", presumably because the bill might otherwise be considered an *ex post facto* law. The American Bar Association and others

[42] S. 996, 87th Cong., 1st Sess. (1961); H. R. 6059, 87th Cong., 1st Sess. (1961). Under these bills, if both a corporation and an individual employed by it were convicted of criminal violations of the Sherman Act, the trial court would be given discretion to enjoin the convicted individual's employment by the convicted corporation "for a period not exceeding one year", provided that application for such relief was made by the Attorney General on a showing of probable cause for believing that the individual might engage in additional antitrust violations if he were not suspended.

opposed this amendment on the ground, among others, that it was "inconsistent with fundamental principles of due process" (Report of Hearings on S. 996, Part I, p. 97). This proposed legislation died in the 87th Congress, and no attempt was made to revive it thereafter.

Yet the judgment below goes so much further that it is tantamount to a decree of attainder.[43] The court permanently enjoined the continued employment of one who was not a party, against whom the government made no charges, and who even now has not been advised of any evidence against him. This unprecedented judicial fiat violates basic principles of fairness and due process.[44]

The requirements of due process in proceedings affecting employment were considered in *Willner* v. *Committee on Character and Fitness, supra,* where this Court reversed the Court of Appeals of New York on the ground that:

> "'Those who are brought into contest with • • • Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.' *Morgan* v. *United States,* 304 U. S. 1, 18-19." (373 U.S. at 105)

The *Willner* decision relies in part on *In re Oliver,* 333 U.S. 257 (1948), in which the Court vacated a summary punishment for an alleged criminal contempt, stating:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his

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[43] While a bill of attainder is a legislative act which inflicts punishment without a trial, *Brown* v. *United States,* 381 U. S. 436 (1965), this judicial decree inflicting punishment on a non-party witness who was not on trial is no more valid.

[44] In addition, it violates the express provision of Section 4 of the Sherman Act that the court shall proceed only "when the parties complained of have been duly notified". 15 U. S. C. §4.

> defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (333 U.S. at 273)

See also, *Lewis* v. *City of Grand Rapids,* 222 F. Supp. 349 (W.D. Mich. 1963), which followed this Court's decision in the *Willner* case and concluded that "liberty includes the right to pursue a lawful occupation • • • [and] • • • the right to liberty inheres in the very nature of man" (222 F. Supp. at 386).

None of these procedural and substantive rights were recognized by the court below. Instead, on its own initiative, it issued an interdict which deprived Mr. Fleming and defendants of their liberty without due process of law.

When injunctions analogous to this one (though not approaching it in severity) have been proposed even with respect to parties defendant, they have generally been denied because the court's power to punish for contempt is sufficient to assure compliance with its decree, without imposing further strictures on an individual defendant's right of employment.[45] As Mr. Justice Reed stated in his concurring opinion in *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 604 (1951): "The paucity of cases dealing with contempt of the Sherman Act injunctions is, I think, an indication of how carefully the decrees are obeyed. • • • full compliance with the decree should be anticipated." Surely, then, full compliance is to be anticipated from a man of such "great strength and force of character, great intellectual ability" and "rare and admirable" qualities as the court below found in Mr. Fleming (C87, C89, R. 691, 693).

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[45] See, *e.g., United States* v. *Imperial Chemical Industries, Ltd.,* 105 F. Supp. 215, 246 (S. D. N. Y. 1952), where the district court refused to enjoin individual defendants from holding office.

Moreover, and quite apart from the foregoing fatal defects in this decree enjoining the further employment of a witness, it is also invalid because there is no factual basis for it. There are no findings of fact as to how Mr. Fleming participated in any conspiracy, or citing any evidence of such participation, or giving any basis for supposing that he would not comply with any decree. Nor did the court suggest any other reason why it felt constrained to deprive Mr. Fleming of employment by Grinnell outside the relevant market after requiring Grinnell to file a plan for divestiture of all its interests within the relevant market.

The "Opinion on Remedy" attempts to support this decretal provision with superficial speculation. It states (at ¶2, R. 765) that Mr. Fleming is "possibly" a person of "risk-taking temperament" and "cannot have been ignorant" that defendants had committed *per se* violations of the Sherman Act "and were continuing to follow patterns conceived in crime". This latter statement presumably refers to the 1907 Agreements which were executed 12 years before Mr. Fleming was employed by Grinnell and which terminated during his presidency. Considering that Mr. Fleming, a layman, was advised by his attorneys that the Department of Justice had cleared Grinnell's acquisition of ADT's stock after reviewing the 1907 Agreements, and Grinnell's relationship with the other defendants, in all fairness he can hardly be taxed with knowledge of any illegality or with failing to eliminate the post-1954 "patterns" discovered by the court below.

The opinion continues: "*Maybe* he shrewdly weighed business advantage", and concludes: "*Whatever* may have been the calculations of defendants or their officers, this court has determined that this case requires a three-pronged judgment" (emphasis added). These statements do not support the decree but instead expose its arbitrary and vindictive character.

In summary, even if we were to assume (a) that Mr. Fleming was a party to this action (instead of having been only a witness), and (b) that he was duly notified of the charges against him and given an opportunity to be heard on them in person or by counsel (instead of having had no notice of any proposed decree affecting him until it was entered), and that defendants were given similar notice and an opportunity to be heard (which they were not), and (c) that the court had power to enter a decree permanently depriving a person from continued pursuit of his chosen employment, and permanently restraining defendants' stockholders from freely choosing their directors (a dubious proposition at best)—even then, there is in this record neither factual support nor practical justification for depriving Mr. Fleming of his life's work and defendants of his services.

(ii) The Decree's Wholesale Divestiture And Exclusion Of Grinnell From The Relevant Market Is Unwarranted.

We have already seen that Grinnell is not in the relevant market as defined by the court below and that (despite the court's misapprehension that Grinnell makes central station equipment) it is neither a significant supplier nor customer of any of the alarm companies. In the jargon of recent antitrust commentary, Grinnell's acquisition of any one of these alarm companies would be a "conglomerate" merger having no effect on competition in the relevant market.[46]

Perhaps for that reason (or perhaps because of its acquiescence in Grinnell's purchase of ADT's stock in 1953) plaintiff has not directly attacked any of Grinnell's acquisitions as such. Its complaint adverts to them only by way of requesting that Grinnell be divested of its interest in

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[46] See Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1394 (1965).

ADT. Moreover, government counsel advised the court at the trial that its "really important findings" need not predate 1951 (C51, R. 430), so that they would be after Grinnell's purchase of AFA's stock in 1949 and of Holmes' stock in 1950.

Nevertheless, the trial court held that, because the alarm company defendants together occupy a predominant position in the allegedly relevant market, Grinnell must dispose of all of its stock in ADT and AFA and Holmes, and all defendants, including Grinnell, must be prohibited from acquiring "the stock, assets or business of enterprises in the designated market". Not only does this deep surgery go far beyond the demands of the complaint but, under any view of the facts of this case, it is more like mutilation than the "surgical ruthlessness" condemned in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954).

Even assuming (without, of course, conceding) that the court correctly held that defendants have monopolized the central station market, and that divestiture is an appropriate remedy for that violation, we submit that a judicious pruning of Grinnell's interest in that market would have afforded an adequate remedy, and that the complete uprooting of it ordered by the court below was plainly unnecessary. More specifically, by ordering Grinnell to divest itself of its interest in *either* AFA and Holmes *or* ADT, the court could have granted complete relief from any alleged offenses, so that its attempt to completely exclude Grinnell from the allegedly relevant market is unwarranted.

AFA and Holmes, whether singly or in combination, have neither a monopoly nor a predominant position in this market; the stipulated facts (GX 312, R. 2266-78, 331) show them instead as poor seconds to ADT. Holmes offers burglary and holdup protection in New York, Philadelphia and Pittsburgh only; while AFA offers fire protection services

in New York, Philadelphia and Boston only (Findings 8-9, R. 748-49; R. 675-76). Thus they complement each other and in combination could offer both kinds of central station services in these four cities and any others they may enter (R. 676). In contrast, ADT offers central station protection against both kinds of risks, as well as others, in 115 cities throughout the United States (Finding 7, R. 748). While the court below found that all defendants combined had 87% of the accredited central station business (Finding 20, R. 751), on that basis ADT alone would have about 73% of that business (GX 312, R. 2268, 331). Thus the competition that Holmes and AFA combined could offer to ADT would not give them any unfair advantage.

The underlying assumption of the court below seems to have been that the combination of all three alarm companies under a single ownership is illegal. But obviously the divorcement of that combination can be accomplished even though Grinnell continues to retain part of its investments, and there is no reason why the choice of which interest to retain should not be left to Grinnell. See *United States* v. *Pullman Co.*, 53 F. Supp. 908 (E. D. Pa. 1944), and 64 F. Supp. 108 (E. D. Pa. 1946), *aff'd by an evenly divided court*, 330 U. S. 806 (1947).

Plaintiff is a petitioner in equity. "The fact that this suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief." *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 377 (1933). The applicable principles of law were aptly summarized in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386 (1945):

> "• • • [W]e may not impose penalties in the guise of preventing future violations. • • • the court may not create, as to the defendants, new duties, prescription of which is the function of Congress,

> or place the defendants, for the future, 'in a different class than other people,' as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendant's business at the peril of a summons for contempt'; enjoin 'all possible breaches of the law'; or cause the defendants hereafter not 'to be under the protection of the law of the land.' " (323 U. S. at 409-10)

In short, a court of equity should not decree "unnecessary restrictions", *Lorain Journal Co.* v. *United States,* 342 U. S. 143, 156 (1951).

Here, the court ignored all of the possible alternatives and excluded Grinnell, which has never been in the relevant market, from all past and future investments in the market. The effect of this provision on Grinnell, which does not know the central station business well enough to heed the court's caution that "internal growth is the mark of the free life" (R. 766), is to outlaw it from a legitimate business open to others, including the other defendants.

This lack of judicial restraint is particularly inappropriate here, where there is special reason for restraint. We have already seen that Grinnell's last acquisition (of ADT when it already had control of Holmes and AFA) was made in reliance on the Antitrust Division's acquiescence in it. The Department's detailed prior investigation of that transaction is admitted in its answers to interrogatories (Gr. Ex. J76, R. 4309, 668),[47] and yet this case was not brought until 8 years afterwards. Even then, the complaint did not allege that any of Grinnell's acquisitions was illegal, and it sought relief bearing on only one of

[47] The Department's reasons for this decision do not appear in the record. Defendant attempted to discover them by trial subpoenas addressed to the Department of Justice, but these were quashed by the trial court (R. 322-23).

them. While these facts may not estop all government action now, they are at least relevant considerations in determining the scope of equitable relief.[48]

In all probability, Grinnell would not even be a defendant in this case if it had not acquired ADT's stock from Western Union in 1953 in reliance on what it understood to be the Department of Justice's "clearance" (C83, R. 681). Since then, the number of competing central station companies has multiplied many times (GX 304, 305, R. 2216-27, 327; D. Ex. D75(b), R. 4507-08, 496), and the alarm companies' share of central station revenues has steadily declined (GX 312, R. 2268, 331). Furthermore, the 1907 Fire Alarm Agreements were in effect and were submitted to the Antitrust Division in 1953, although they terminated the following year, and Grinnell at that time supplied actuating devices to ADT and AFA, although it no longer does so.

All of these changes since 1953 have been in the direction of increased competition. Despite these facts, and despite the obvious implication in the decision that Grinnell was held liable precisely because of its acquisition of ADT's stock (R. 761-62), the court below held that Grinnell now must be divested of its interests in ADT, AFA and Holmes, and must not make future investments in the central station business.

No justification for such wholesale divestiture has been advanced. Indeed, the only conceivable justification would be if Grinnell's continued ownership of the stock of even one of the alarm companies would somehow give that company some unfair competitive advantage. But that is

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[48] *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 634 (1953); *United States* v. *United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam*, 347 U. S. 521 (1954).

clearly not the case. Grinnell does not provide the alarm companies with any financial or other advantage. Quite the contrary, Grinnell's investment in the other defendants was motivated by its desire to offset the cyclical nature of its own income (Gr. Ex. J2, J75, R. 4052-53, 4229, 668; R. 674-76), and Grinnell has consistently received financial help from them in the form of dividends on its investments (C89, R. 694).

There is, therefore, no justification at all for any outlawry of Grinnell from the relevant market. Once again the patently punitive nature of the decree adds further proof to the already abundant evidence of the trial court's prejudice.

(iii) The Decree Unfairly Imposes On Defendants The Burden Of Interpreting The Antitrust Laws At Their Peril.

The third prong of the decree is the following provision:

> "* * * Defendants and all acting in behalf of them or any of them are hereby enjoined from further restraining trade, or attempting or combining to restrain trade, in that designated market and from further attempting to monopolize, or conspiring to monopolize, or monopolizing that designated market."

In the opinion, Judge Wyzanski said of the very statutory phrases in which he enjoined defendants that they are so vague that the Sherman Act would "if enacted in the same words today * * * not easily hurdle the barrier of the Fifth Amendment" (R. 744). Putting that interesting dictum aside, this injunction is wholly improper under the "first principles of justice" referred to by Mr. Justice Holmes in *Swift & Company* v. *United States,* 196 U. S. 375 (1905). The Court there struck down "a sweeping injunction to obey the law" (p. 401) and refused to sanction any

decree "so vague as to put the whole conduct of defendants' business at the peril of a summons for contempt" (p. 396).[49]

The difficulties of interpreting this language are well illustrated by the facts of this case. In 1951, ADT refused to continue negotiations for a renewal of the 1907 Fire Alarm Agreements on the basis that its attorneys feared a charge of unlawful exclusive dealing. Grinnell's attorneys did not agree with this, and they offered to request the Department of Justice's opinion (GX 85, R. 1415-16). In 1953, these agreements were in fact submitted to the Anti-trust Division of the Department of Justice and no question was raised as to their legality. Now that they have expired, the court below finds these agreements so unlawful that amputative measures are required to remove any "patterns" or "folds in the industrial scene" remaining as vestigial remnants of them.

At the same time, without specifying any prohibited "patterns" of conduct in its injunctions, but not content with the criminal and civil sanctions provided by Congress for any future violations of the Sherman Act, the court below added the risk of a contempt citation for failure to obey the same Congressional commands. This is a fundamental unfairness which this Court has repeatedly refused to countenance even in administrative orders,[50] and which it should not countenance here.

By each of these provisions of its "three-pronged judgment", the trial court amply fulfilled its pretrial

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[49] See also, *Schine Chain Theatres, Inc.* v. *United States*, 334 U. S. 110 (1948), and Rule 65(d) of the Federal Rules of Civil Procedure, which requires that:

> "Every order granting an injunction * * * shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

[50] *E.g.*, *N.L.R.B.* v. *Express Publishing Co.*, 312 U. S. 426, 435-36 (1941), *F.T.C.* v. *Henry Broch & Co.*, 368 U. S. 360, 368 (1962).

threats of a severe decree, more extreme than that demanded in the complaint or by government counsel (A31, R. 281-82). Each would improperly place defendants "in a different class than other people" (*Hartford-Empire Co.* v. *United States, supra,* at pp. 409-10), impose "unnecessary restrictions" on them (*Lorain Journal Co.* v. *United States, supra,* at p. 156), and "punish" them, *United States* v. *E. I. duPont deNemours & Co.,* 366 U.S. 316, 326 (1961). In the latter case, this Court emphasized:

> "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."

The court below heeded none of these admonitions. Instead, it entered a decree so harsh that it violates all of the equitable principles laid down by this Court and is obviously excessive under any view of the facts of this case.

D. Defendants Are Entitled To a New Trial Before Another Trier Of The Facts.

The preceding sections of Point I have described a number of egregious errors permeating the proceedings below, from the trial court's pretrial prejudgment to its draconian decree. Each of these, taken separately, was prejudicial and reversible error; together they form a stark picture of judicial unfairness in bold relief. Accordingly (unless this complaint is dismissed for the reasons discussed hereafter), the interests of justice require a new trial.

In that event, it is clear that another judge must preside. This procedure would be appropriate in any case

both in order to preserve the appearance of justice and to avoid problems that might otherwise arise from the human tendency to cling tenaciously to prior convictions.[51]

In this case, the general rule is particularly applicable because of the trial court's previous prejudgment of the matter. With all respect, it would be asking the humanly impossible to request the judge who presided at the prior trial to erase all preconceptions from his mind and to try this case anew. Instead, another judge must be appointed for any further proceedings herein.

Quite apart from the foregoing, there are other substantive errors on the basis of which the judgment below should be reversed. This Court may, of course, exercise its discretion by not considering these further grounds for reversal if it orders a new trial as requested above. However, we submit that they should be considered in any event so that the Court may give appropriate instructions for dismissal or for a new trial. While that procedure imposes an additional burden on this Court now, it may well expedite these proceedings in the long run because, if the arguments advanced hereafter are correct, the complaint should be dismissed as to Grinnell forthwith and without any new trial, and because such consideration will shorten any new trial and subsequent review.

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[51] *E.g., Cooke* v. *United States*, 267 U. S. 517, 539 (1925); *Offutt* v. *United States*, 348 U. S. 11, 18 (1954); *United States* v. *Drumm*, 329 F. 2d 109, 114 (1st Cir. 1964); *Knapp* v. *Kinsey*, 232 F. 2d 458 (6th Cir.), *rehearing denied*, 235 F. 2d 129, *cert. denied*, 352 U. S. 892 (1956); *Moskun* v. *United States*, 143 F. 2d 129, 130 (6th Cir. 1944); *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F. 2d 804, 810-11 (9th Cir.), *cert. denied*, 375 U. S. 831 (1963).

II.

THE DISTRICT COURT'S HOLDING THAT GRINNELL VIOLATED SECTION 1 OF THE SHERMAN ACT IS NOT SUPPORTED BY ITS FINDINGS OR SUPPORTABLE BY THE RECORD.

The lower court's decision (particularly in the conclusions of law) gives the impression that the alarm company defendants were found to have violated Sections 1 and 2 of the Sherman Act, but that this is only a Section 2 case insofar as Grinnell is concerned. The decree, however, lumps all the defendants together as violators of both sections.

In this portion of our argument, we first note that the court's failure to make specific findings and conclusions in support of its judgment that Grinnell violated Section 1 would require a remand for further findings and conclusions if there were no other errors in the proceedings below; we submit, however, that instead of such a remand the Section 1 charge against Grinnell should be dismissed because this record cannot support any finding of such a violation.

A. The District Court Failed To Make Sufficient Findings To Support Its Judgment.

This Court, and most of the courts of appeals, have emphasized that a proper review is possible only when the trial court complies with Rule 52(a) of the Federal Rules of Civil Procedure by making supporting findings of fact and conclusions of law.[52] For example, in *Commissioner*

[52] Rule 52(a) provides, in pertinent part:

"In all actions tried upon the facts without a jury • • • the court shall find the facts specially and state separately

v. *Duberstein*, 363 U. S. 278, 292 (1960), referring to findings of a district court so insufficient as to require vacation of its judgment, the Court stated:

> "Such conclusory, general findings do not constitute compliance with Rule 52's direction to 'find the facts specially and state separately . . . conclusions of law thereon.'"

See also, *Woods Constr. Co.* v. *Pool Constr. Co.*, 314 F. 2d 405, 407 (10th Cir. 1963), summarizing the reasons for appellate courts' insistence on proper findings of fact by trial courts.

This Court has been given no opportunity to review findings and conclusions of the court below with respect to a violation of Section 1 by Grinnell, for none were ever made. Nowhere in its lengthy opinion does the district court state that Grinnell violated Section 1, and the insertion of that conclusion in the decree alone is patently insufficient to comply with Rule 52(a).

While the decision below fails to meet this prerequisite for proper review, we contend that a remand for more specific findings is unnecessary, and that dismissal is the more appropriate course, because the government failed to sustain its burden of proof. In other words, we submit that no judgment that Grinnell violated Section 1 could be supported by this record. For purposes of this latter argument, we must now examine any possible basis for the court's decree.

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its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 * * *."

See *Kelley* v. *Everglades Drainage Dist.*, 319 U. S. 415 (1943); *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U. S. 310, 316 (1940).

B. Grinnell Cannot Be Held Vicariously Liable For Acts Of The Other Defendants.

Such clues as the court below gave indicate that it adjudged Grinnell in violation of Section 1 because of the conduct of the other defendants (or, more accurately, their failure to compete among themselves to the satisfaction of the court, Findings 51a-53, R. 758-60) and because of its conviction that the "rule of reason is a thing of purely historical interest" (C30, R. 371).

Consistent with its mass treatment of all defendants before and during the trial, the court's findings frequently fail to distinguish among them. For example, findings concerning national central station operations, which clearly can only refer to ADT, are attributed to "defendants" (Findings 40, 47, R. 755-57); findings expressly related to ADT (Findings 48, 49, R. 757) are cited in support of the conclusion that "defendants have not borne, and cannot bear their burden" of proof (Finding 51, R. 758); and still other findings ascribe to all defendants indiscriminately certain pricing practices which could only pertain to one or more of the alarm company defendants (Finding 55, R. 760). From these findings, and from the court's opinion as a whole, it seems clear that the court's judgment against Grinnell on the Section 1 charge is founded on the tacit assumption that Grinnell may be held liable for acts of ADT and the other defendants in the central station business.

But there is no basis here for applying any theory of vicarious liability to Grinnell. We have already seen that the other defendants were not integrated into, or dominated by, Grinnell. Instead, each defendant has its own autonomous management, and there is no reason to ignore their separate corporate entities, whether by considering ADT the alter ego of Grinnell or by applying any other theory of piercing the corporate veil. Moreover, Grinnell's owner-

ship of stock in the other defendants affords no legal justification for the lower court's attempt to make Grinnell responsible for their acts. Mere stock ownership imposes no such vicarious liability.[53]

Perhaps the most recent statement of the law on this subject is in Mr. Justice Goldberg's concurring opinion (in which Justices Harlan and Stewart joined) in *Meat Cutters* v. *Jewel Tea Co., Inc.*, 381 U. S. 676 (1965). There he described the decision being reversed in *Mine Workers* v. *Pennington*, 381 U. S. 657 (1965), in the following terms:

> "This * * * in effect is a holding that the ownership of a controlling or substantial interest in a company which violates the antitrust laws subjects the owner of that interest to personal antitrust liability. In my view, this is clearly not the law. The ownership of a controlling or substantial interest in a company which conspires with others in violation of the antitrust laws does not in itself impose antitrust liability on the owner. [Citations omitted.] Rather the owner must be shown to have participated knowingly and actively in the alleged illegal activity. [Citations omitted.]" (381 U. S. at 734)

Applying that rule to this case, there is no showing here that Grinnell participated in the alleged illegal conspiracy. The closest findings of fact concern conduct of the alarm companies which the court related to the old Agreements, which expired in 1954. Conceding that it might well be too late for the government to seek relief against these agree-

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[53] *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 402-06 (1945); *Buckeye Powder Co.* v. *E. I. duPont deNemours Powder Co.*, 248 U. S. 55, 62-63 (1918); *National Lead Co.* v. *F.T.C.*, 227 F. 2d 825 (7th Cir. 1955), *rev'd on other issues*, 352 U. S. 419 (1957); *United States* v. *Standard Oil Co. of California*, 155 F. Supp. 121, 152 (S. D. N. Y. 1957), *aff'd*, 270 F. 2d 50, 58 (2d Cir. 1959); *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 176 F. Supp. 527, 537 (D. Minn. 1959), *aff'd*, 289 F. 2d 418 (8th Cir. 1961).

ments under Section 1, Judge Wyzanski nevertheless discerned "patterns" or "folds in the industrial scene" which survived their expiration and which formed the basis for his Section 1 findings.[54]

Passing over the threshold issue of whether these "patterns" or "folds" are equivalent to the combinations and conspiracies condemned by Section 1 of the Sherman Act, the heart of the matter is that the court failed to find and the government failed to prove that Grinnell, in the language quoted above, "participated knowingly and actively" in an unlawful restraint of trade. For that reason alone, the Section 1 charge against it should be dismissed.

Moreover, even if there had been findings that Grinnell participated in "patterns" evidencing restraints on competition among the alarm companies, viewed in the light of the corporate relationship among these companies that conduct would be reasonable and not in violation of the Sherman Act.

C. The Relationship Between Grinnell And its Alarm Company Subsidiaries Does Not Violate Section 1.

Speaking of the "by-now lapsed legal agreements during the period 1904-1954 between the alarm company defend-

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[54] Paragraph 11 of the Opinion on Liability (R. 764) implies that the defenses of laches and mootness might preclude "an injunction against the restraints as such". Those defenses are reinforced here by the four year statute of limitations which, on 1954 events, would have expired three years before the filing of this action. 15 U. S. C. §15b, 69 Stat. 283 (1955).

However, Conclusion of Law 3 states:

> "Because of the formal expiration of the agreements, it, *conceivably*, might be too late for the Government now to seek against defendants relief from the legal instruments as such. But the folds in the industrial scene have remained even though the technical pressure of the legal instruments has been withdrawn. Channels of activity begun under legal formalities became habitual, and, even after the formalities had expired, in most cities have continued to carry the same menace to free trade." (R. 761, emphasis in original)

ants before they were affiliated", the trial court found that: "Though the agreements are no longer legally effective, their influence in forming business patterns remains to a discernible extent" (Finding 51a, R. 758). Although its opinion is not entirely clear, the court apparently concluded that, while there is no formal agreement not to compete among the alarm companies, there is in fact no strong competition among these affiliates—and this because of habitual adherence to the way they did business under ancient agreements allocating territories and functions among them.[55] The findings point out particularly that all defendants do not offer all types of central station services, and that AFA and Holmes have not entered new markets after 1954 (Findings 52, 53; R. 758-60).

We need not stop here to consider whether failure to compete, when there has been no finding of an agreement not to compete, would establish a violation of Section 1 of the Sherman Act if these companies were unaffiliated (though it is doubtful that it would) because since 1953 the alarm company defendants have all been affiliated as

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[55] As we have already noted, the court's findings correctly identify ADT and Holmes as the only parties to the Burglar Alarm Agreement of 1906, and Grinnell, ADT and AFA (but not Holmes) as parties to the Fire Alarm Agreements of 1907. The latter Agreements resolved patent conflicts among the parties but had the effect of allocating territories between ADT and AFA for purposes of SS&WFA business. Grinnell's role was to supply SS&WFA actuating devices in return for 25% of the resulting revenues. Even before Grinnell acquired control of ADT's stock, Grinnell's attorney considered this agreement to be a lawful joint venture rather than any violation of any antitrust laws (GX 85, R. 1403-11, 1415, 327). Moreover, all these agreements pertained to certain services of central stations which could only compete for customers 25 miles away, and they were entered at a time when such local arrangements were considered beyond the scope of the Sherman Act. *Hopkins* v. *United States*, 171 U. S. 578 (1898); *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

subsidiaries of Grinnell, and their conduct since then must be judged in the context of these affiliations.[56]

Accepting the lower court's findings that the alarm companies' "patterns of conduct" show a failure to compete among themselves, we submit that these patterns are not illegal because, as the Report of the Attorney General's National Committee To Study The Antitrust Laws succinctly put it: "To demand internal competition within and between the members of a single business unit is to invite chaos without promotion of the public welfare" (p. 34).

The issue presented here has been left unsettled by prior rulings of this Court that:

> "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. *E.g., Kiefer-Stewart Co.* v. *Seagram & Sons, supra* at 215." *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 598 (1951).[57]

These cases only decided that parent and subsidiary are not "immune" from the antitrust laws when they combine to restrain the trade of third parties (as in *Schine,* 334 U. S. at 116), and that this rule is "especially applicable" when the affiliated companies hold themselves out to the trade as competitors (as in the *Kiefer-Stewart* case, 340 U. S. at 215). They do not reach the issue here.[58]

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[56] For many years prior to the commencement of this action, Grinnell has had a sufficient interest in each of the alarm companies to enable it to merge them into a single enterprise without the consent of minority stockholders. This would be permissible under N. J. Stat. 14:12-3 as to ADT (a New Jersey corporation in which Grinnell owns 80% of the stock) and under 8 Del. Code §51 as to AFA (a Delaware corporation in which Grinnell owns 90% of the stock). There are no other stockholders in Holmes.

[57] To the same effect, see *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 229 (1947), and *Schine Chain Theatres, Inc.* v. *United States,* 334 U. S. 110, 116 (1948).

[58] Here, there are neither findings nor proof that the parent-subsidiary relationship was brought about for purposes of further-

The conduct of these defendants as found by the court below did not result in restraints on the competition of others.[59] Instead, the court found that, by inertia or by habitual adherence to old patterns of conduct, the alarm companies still do business in much the same way as when they were parties to agreements allocating territories and functions among them (Findings 52, 53, R. 758-60). We urge that the failure of subsidiaries to compete among themselves cannot be a violation of Section 1. We do not, however, contend that a parent and subsidiary can never be the two "separate persons" necessary for a conspiracy to restrain trade, or that the mere existence of the parent-subsidiary relationship is any defense to a Section 1 charge. Rather, our contention is that the mere existence of the parent-subsidiary (or sister company) relationship, and the normal business consequences which naturally flow from such relationships, cannot constitute an *offense* under Section 1.

In other words, we contend that it is neither unreasonable nor illegal for commonly-owned companies not to compete, even under circumstances in which unaffiliated companies might be expected to compete. As this Court stated in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U. S. 19, 29 (1962), in a different but analogous

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ing a restraint of trade (as in the *Yellow Cab* and *Timken* cases) or was concealed (as in *Kiefer-Stewart*). On the contrary, there is a finding that the relationship was motivated by investment purposes (Finding 18, R. 74, 77, 750), and proof that it was frankly disclosed to the public (GX 97, R. 1348, 1352, 1518, 327).

[59] The only possible exceptions to this were the court's findings with respect to ADT's pricing and acquisitions. It is doubtful that these practices would afford any basis for a holding that ADT violated Section 1, because the court found that the most that could be said about harm to competitors is that some of them complained of unsatisfactory profits (Finding 45, R. 756). But in any event, there is no evidence that Grinnell participated in them.

factual context: "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect * * *." Applying that language here, that Grinnell failed to merge these three alarm companies together results in "organizational distinctions that are of *de minimis* meaning and effect" in comparison with the "grave legal consequences" the government here seeks to impose upon them.

While we have found no decision of this Court precisely in point, the weight of authority among lower courts and commentators is that conduct which would be unlawful *per se* if engaged in by unaffiliated companies (such as allocating markets or fixing prices) may be perfectly proper among affiliated companies. For example: *United States* v. *General Electric Co.*, 115 F. Supp. 835 (D.N.J. 1953), enjoining territorial allocations other than those between a parent and a majority-owned subsidiary; *United States* v. *Arkansas Fuel Oil Corp.*, 1960 Trade Cases ¶69,619, at 76,496 (N.D.Okla. 1960), where the district court, finding no controlling decision, dismissed charges of price fixing between a parent and a subsidiary corporation; *Bailey's Bakery, Ltd.* v. *Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964), holding that it was not illegal for a local subsidiary to agree with its national parent company on the subsidiary's prices in its territory. See also, *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796, 799 (S.D.Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U. S. 991 (1956), and *American TCP Corp.* v. *Shell Oil Co.*, 127 F. Supp. 208, 209 (S.D.N.Y. 1955).

The commentaries include the following from the Report of the Attorney General's National Committee To Study The Antitrust Laws (1955):

"No social objective would be attained were subsidiaries enjoined from agreeing not to compete with each other or with their parent. • • •

"Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated." (at 34)

"Where more than a majority of voting capital stock in two or more corporations is lawfully owned by the same individual with the remainder held by noncompetitors only for investment, the situation is clearly equivalent to a parent-subsidiary relation." (at 35)

To much the same effect are Handler, *Contract, Combination or Conspiracy,* American Bar Association Antitrust Section of Antitrust Law, Vol. III, pp. 38, 47 (1953): "It is fatuous to require a corporation to compete with itself"; Stengel, *Intra-Enterprise Conspiracy under Section 1 of the Sherman Act,* 35 Miss. L. J. 5, 27 (1963): "Finding a violation of Section 1 of the Sherman Act because of a conspiracy solely between a parent and its subsidiaries, or between subsidiaries, is like condemning the bi-sexual oyster for incest"; McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act,* 41 Va. L. Rev. 183, 216 (1955); *Developments in the Law, Criminal Conspiracy,* 63 Yale L. J. 372, 381 (1954); 72 Harv. L. Rev. 920 (1959); 47 Minn. L. Rev. 900, 906 (1963).

While some of these writers suggest that an intra-enterprise conspiracy is a contradiction in terms, the argument here advanced does not go that far. We urge only that, in deciding whether a pattern of cooperation is an unreasonable restraint of trade in violation of the Sherman Act, the corporate relationship of the alleged con-

spirators must be considered, and that relationship may make it reasonable for these companies not to compete.

If the alleged conspirators' common ownership is not considered (and it was virtually ignored by the trial court here) then almost any cooperative action becomes suspect. And since cooperation necessarily follows from the fact of common ownership, their corporate affiliation alone could subject such companies to a charge of violating Section 1—and their relationship itself might well result in their conviction. If this common form of corporate organization were to carry with it such grave risks, the result might well be mass mergers of subsidiaries into single monolithic enterprises, with far-reaching consequences.[60]

To take these defendants as a small example, had Grinnell merged all three alarm companies into itself (calling them the ADT, AFA and Holmes "Divisions" of Grinnell), it is doubtful that the government or any court would then have considered any allocation of territories or work among those Divisions to be a violation of Section 1. See, *e.g.*, *Deterjet Corp.* v. *United Aircraft Corp.* (*Hamilton Standard Div.*), 211 F. Supp. 348, 353-54 (D. Del. 1962). But surely the issue of whether one has violated a criminal statute cannot turn on such a formal matter as the failure to perform a merger that could have been accomplished unilaterally.

The fact is that the only "restraint" Grinnell can be charged with is self-restraint or inaction in the relevant market after it invested in these companies. It left each as

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[60] Among them: loss of the flexibility subsidiaries afford for such purposes as fulfilling licensing requirements here and abroad, giving local autonomy to the subsidiaries' management, and pioneering in new fields while at the same time limiting liability.

a separate enterprise operating under its own independent management, which had been chosen prior to Grinnell's investment, and each continued to offer the same services in the same areas as it had before.

To summarize, there were no findings that Grinnell is responsible for the patterns of conduct which the court below found to be in violation of Section 1, and no proof that these patterns were unreasonable for affiliated companies (instead of being normal business conduct). For both of these reasons, the Section 1 charge should be dismissed.

III.

THE DISTRICT COURT'S HOLDING THAT GRINNELL VIOLATED SECTION 2 IS BASED ON A SERIES OF ERRORS.

The trial court reached its conclusion that Grinnell violated Section 2 of the Sherman Act in three illogical leaps. First, it held that the relevant market is a national market for accredited central station protection services, regardless of their location and of the nature of the risk protected against, and does not include any competing services. It then found that the alarm company defendants had such a high percentage of that market that all defendants had the burden of proving their innocence, although they were not advised of that burden until after the trial. Finally, the court held that, because of certain alleged conduct of ADT, this presumption of guilt had become conclusive as to all defendants.

The tortuous path to this non-sequitur is retraced below.

A. The "Relevant Market" Was Defined Incorrectly.

Since Grinnell's basic business is selling products used in building construction, rather than offering services pro-

tecting customers against hazards, the court below correctly found that Grinnell does not compete in the relevant market. However, it incorrectly defined the relevant market by:

(a) stretching the geographic boundaries of protection service markets so as to include in one "national" market isolated central stations separated by thousands of miles, although it found that each is physically independent (Finding 4, R. 747-48) and incapable of serving subscribers more than 25 miles away (Finding 3, R. 747);

(b) blurring the functional boundaries of protection services so as to include in the same market such non-competitive services as protection against fire, burglary, and industrial process malfunction;

(c) selecting from this amorphous "market" only enterprises which receive alarms at, and respond to them from, central stations, while excluding effective competition from similar services;

(d) narrowing this cross-segment still further by confining it to such central stations as are accredited by insurance underwriters for purposes of insurance premium discounts.

The result is a distortion bearing the scars of all this market-mangling. For example, it includes central stations operated by Holmes in Pittsburgh, by National Protective Corporation in Baltimore (D. Ex. D75(b), R. 4507, 496), by Central Alarm Company, Ltd. in Honolulu, Hawaii (GX363, R. 3229-3241, 333, 335), and by AFA in Boston, in the same "market", even though none of them can reach subscribers more than 25 miles away and they protect against different risks—AFA against fire, Holmes and

the Baltimore company against burglary and the Honolulu company against both (GX312, R. 2274, 331). At the same time, actual competitors (who offer the same customers protection against the same risks in the same cities as the alarm company defendants) are not included in the market if their automatic alarm systems are entirely on the protected premises, or connect directly to a police headquarters or firehouse, or use a telephone answering service as their central office, or if they have a central station but have not sought or received insurance accreditation.

Judge Wyzanski's reliance on this economically-unreal market is partially explained by his repeatedly-expressed view (*e.g.*, C40, C54-C55, C74-C79, R. 393, 544, 660-65) that this Court's interpretation of Section 2 in *United States* v. *E. I. duPont deNemours & Co.*, 351 U. S. 377 (1956), is no longer the law and that the notion of "cross-elasticity of demand" is now "out of the effective vocabulary of antitrust defendants" (C54-C55, R. 544). Apart from the decision below, we know of no decision of any other court overruling the *Cellophane* case, and numerous other cases have applied it both before and after the decision below. See, *e.g.*, *United States* v. *Chas. Pfizer & Co.*, 1965 Trade Cases ¶71,445 and 245 F. Supp. 737 (E. D. N. Y. 1965).[61]

The *Cellophane* case held that the defendant did not violate Section 2 (even though it produced 75% of all cellophane sold in the United States, and set the price of cellophane) because, despite the differences in cost and charac-

[61] *Cf. Walker Process Equip., Inc.* v. *Food Mach. and Chem. Corp.*, 86 S. Ct. 347 (1965), where the Court noted that a patented article's "exclusionary power" can be measured only after the relevant market is defined because "[t]here may be effective substitutes" available.

teristics between cellophane and other flexible wrappings, they competed in the same relevant market. The majority found it "inconceivable that price could be controlled without power over competition or vice versa" (p. 392), and went on to reason:

> "Whatever the market may be, we hold that control of price or competition establishes the existence of monopoly power under §2. Section 2 requires the application of a reasonable approach in determining the existence of monopoly power just as surely as did §1." (p. 393)
>
> "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.
> • • •
>
> "In determining the market under the Sherman Act, it is the use or uses to which the commodity is put that control." (pp. 395-96)
>
> "• • • [the] market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered." (p. 404)

The application of those principles to this case was so clear to Judge Wyzanski that he could only conclude that, if he was right, *Cellophane* was overruled. The existence of other protection services which provide effective competition to accredited central stations could not be seriously disputed.[62] Some competing services are lower in price than

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[62] The court found:

> "Business or other enterprises located in cities where there is CSPS have the option, of course, of using watchmen,

central station services (Finding 14, R. 749-50), and the court found that because of "fringe" competition from them defendants have been unable to obtain their minimum basic rates "Even where they have no competition from other CSPS companies" (Finding 46, R. 756). The court's findings thus make it clear that interchangeable substitute services, which compete so effectively that they have forced the alarm companies to reduce prices below their minimum basic rates, were excluded from the relevant market.[68] Clearly, then, if *Cellophane* is still a valid precedent, the decision below was wrong.

Since *Cellophane*, the Court has usually considered defining the "relevant market" in cases under Section 7 of the Clayton Act (which has not been invoked here) rather than under Section 2 of the Sherman Act. *E.g.*, *Brown Shoe Co. Inc.* v. *United States*, 370 U.S. 294, 318

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watchdogs, automatic proprietary systems confined to one site, (often, but not always), alarm systems connected with some local police or fire station, often unaccredited CSPS, and often accredited CSPS. There are business or other enterprises which in the same city exercise their options differently for different sites in that city. Thus, the Government itself in Washington uses at some public buildings a proprietary system; at others, accredited CSPS." (Finding 12, R. 749).

[68] The court included in this "fringe" competition watchmen services (Finding 46, R. 756) despite its earlier findings as to their relative lack of utility (Finding 29, R. 753). In fact, they are a much used form of fire and burglary protection, even though they are more costly than CSPS (Gov't Trial Brief, pp. 193-97; GX 318, R. 2397-98, 333, 335; GX 357, R. 3136-40, 333, 335). Their efficacy is attested to by the fact that they may result in burglary insurance premium discounts of up to 65.7% (GX 5, R. 1012, 1016, 327; GX 346, pp. 59-60, R. 2990-91, 333, 335). The other forms of automatic protection services noted above are even closer substitutes for CSPS.

(1962), and *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964). The difference between these two statutes was described by Judge Weinfeld in *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp 576 (S.D.N.Y. 1958):

> "• • • monopoly power was defined by the Supreme Court in the Cellophane case as 'the power to control prices or exclude competition.' Obviously, when the question is power over price, substitute products may be relevant because they can limit that power. The issue under §7 of the Clayton Act is not whether a merger may result in a company having power over price or the power to exclude competition. The issue under §7 is whether there is a reasonable probability of substantial lessening of competition. There can be a substantial lessening of competition with respect to a product whether or not there are reasonably interchangeable substitutes." (p. 593-94, n. 36)[64]

But even in these recent Section 7 cases, this Court has re-emphasized the significance of cross-elasticity of demand and the validity of the *Cellophane* doctrine. For example, in *United States* v. *Continental Can Co., supra,* Mr. Justice White stated for the Court:

> "• • • it is improper 'to require that products be fungible to be considered in the relevant market.' *United States* v. *du Pont,* 351 U.S. 377, 394. • • • we must recognize meaningful competition where it is found to exist." (378 U.S. at 449)

> "Where the area of effective competition cuts across industry lines, so must the relevant line of commerce; otherwise an adequate determination of the

[64] See also, *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F. 2d 800, 814-15 (9th Cir. 1961), *cert. denied,* 370 U. S. 937 (1962).

merger's true impact cannot be made." (378 U.S. at 457)

We submit that it is equally improper to require that services be fungible (if, indeed, services can be fungible) to be considered in the relevant market. The significant thing is not fungibility, but existence of effective competition from "other alarm or watchmen services" (Finding 46, R. 756) which the court excluded from the relevant market despite the "implied cross-elasticity of demand" implicit in their ability to cause the alarm companies to reduce their prices below their minimum basic rates (Finding 47, R. 756-57). These facts demonstrate that the relevant market cannot be limited to central stations, whether accredited or unaccredited, because they encounter highly effective competition from other services which customers find reasonably interchangeable for the same purposes.[65]

While it is clear from these findings that central station services are only a part of a broader market which includes other protective services, the precise functional and geographic contours of the truly relevant market (or markets) are unclear from this record because the government has wholly failed to meet its burden of proof in this respect. Since this is the first element of a Section 2 case (which even the court below acknowledged the government had the burden of establishing) we respectfully submit that

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[65] One such customer is Howard Stores Corporation, which in recent years switched over 110 of its 140 different protected sites throughout the country from ADT's central station burglary protection to local alarm protection, although there was no cost saving involved (D. Ex. W 33a, pp. 2-5, R. 5424-28, 497, 595-96). Furthermore, as we have already indicated, a substantial number of potential CSPS subscribers prefer watchmen services, even though they are more expensive. See note 63, page 102, *supra*. In

plaintiff should not be permitted to "try, try again", but that its Section 2 case should be dismissed.[66]

B. The Trial Court Erroneously Held That The Alarm Companies' Percentage Of This Erroneously-Defined Market Shifted The Burden Of Proof To Defendants.

Acceding to the expectations of the "cognoscenti" that this Court would some day announce such a presumption, the district court proclaimed in its post-trial opinion that when a "putative offender" occupies a predominant share of the relevant market, there is a presumption that he "criminally acquired" monopoly power (R. 745). The court stated this was "a shifting of the burden not merely of going forward, but of proof" (R. 745), but these procedural terms hardly do justice to this sweeping substantive innovation.[67]

The trial court would thus require the putative offender to prove his innocence. In support of this rule, the opinion assures us that "the informed observer" knows that "durable non-statutory monopolies • • • are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by §1" (R. 746), and that this new departure

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terms of Judge Wyzanski's analogy (Finding 14, R. 749-50) the services he compared to the chauffeur-driven Cadillac (*i.e.*, CSPS) are both more automated and less expensive than the purported Chevrolet Corvairs of this industry (*i.e.*, watchmen and other services).

[66] *E.g., United States* v. *Chas. Pfizer & Co., Inc.*, 1965 Trade Cases ¶71,445 and 245 F. Supp. 737 (E.D.N.Y. 1965).

[67] The device of making substantive changes in the guise of procedural pronouncements has been aptly described as follows:

> "The trial judges made the law of evidence by their usages; and perhaps now they are unmaking it by their

will expedite future antitrust trials (R. 746). We submit that these arguments afford no basis for overturning the time-tested precept that the government has the burden of proving every essential element of an offense under the Sherman Act.

Elaborating on its first premise, the court held lawfully acquired monopoly to be a "*rara avis* more often found in academic groves than in the thickets of business" (R. 745). But the "thickets of business" to which it referred were a few dozen unidentified court records—"thickets" planted and raised in a hothouse atmosphere by lawyers concentrating on Section 2 charges. Formulating this absolute conclusion from that limited sample of businesses brought to court is like formulating conclusions concerning the general health of a community by sampling its hospital patients.

On analysis, this thesis rests on the court's unstated assumption that these defendants may properly be classified with the other (unnamed, but apparently convicted) defendants in the other cases to which the court adverted. In other words, the court's announced presumption of guilt is based on a subliminal assumption of guilt.

The only common factor suggested in the court's opinion between the defendants here and the other defendants is that all of them are said to have had a "predominant" share of the relevant market; there is no indication of what percentage constitutes a predominant share. However, since

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usages. The revocation is hidden by appellate courts which treat departures from the proclaimed evidentiary rules not as though they represented new doctrine, but as though they were insignificant nonreversible errors." ("A Trial Judge's Freedom and Responsibility", by Charles E. Wyzanski, Jr., The Atlantic Monthly, 1952, reprinted in "WHEREAS—A Judge's Premises" (Little, Brown and Company, 1965).)

Grinnell has no share of the relevant market, the burden of proving that it is the "*rara avis*" to which the court referred should not attach to it in any event.

Turning to the court's practical reason for shifting the burden of proof, no economy of trial time that might result would justify imposing on a defendant, charged with violation of a criminal statute, such a presumption of guilt. But even on the solely pragmatic level, there is no reason to believe that a defendant faced with the burden of proving a blanket negative will try his case more quickly.[68] That longer rather than shorter antitrust cases would be the more probable result is apparent from any realistic consideration of the time it would take to formulate and present the kind of corporate "Apologia Pro Vita Sua" called for by imposing on these defendants (whose corporate lives total centuries) the "burden of showing that their proportion of the market *is a mere tribute to their perfect performance*" (Finding 51, R. 758, emphasis added).

Finally, whatever the theoretic or pragmatic merits of this novel procedure, it cannot fairly be applied to defendants who had no notice of it. Although the trial court, along with other "cognoscenti", may have been aware of this "presumption" for some time, as the opinion states, defendants were not aware of it until the lower court published its opinion after the trial.[69] Yet at the same time that he announced his presumption, Judge Wyzanski held that it had become conclusive in this case because "defend-

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[68] See 65 Col. L. Rev. 730 (1965), so commenting on the decision below.

[69] Indeed, other courts are still not aware of it. *United Banana Co., Inc.* v. *United Fruit Co.*, 245 F. Supp. 161 (D. Conn. 1965); *Clark Marine Corporation* v. *Cargill, Inc.*, 226 F. Supp. 103, 111-12 (E.D. La. 1964), *aff'd*, 345 F. 2d 79 (5th Cir. 1965), *cert. denied*, 34 U.S.L.W. 3256 (Jan. 24, 1966).

ants have not borne, and cannot bear, their burden" (Finding 51, R. 758).

No extended discussion of the unfairness of giving retroactive effect to this new procedure would seem necessary. The application of it in the post-trial opinion below smacks of a procedural shell game which should not be condoned by this Court.

C. The Evidence Of Monopolization On Which The Court Relied Is Not Probative Of Any Violation By Grinnell.

Just as the trial court felt free to announce the overruling of the relevant market teachings of the *Cellophane* case, which this Court has so recently reaffirmed, the lower court also felt free to abandon this Court's traditional tests of monopoly power (*i.e.*, power to control prices or exclude competition). It first found that there was no proof that these elements are present in this case (Findings 45-46, R. 756), and then held these findings insignificant because "one or more" of the alarm companies had losses in some areas (Finding 47, R. 756-57).

We have already seen that "other alarm and watchmen services" were found to have competed so effectively with the alarm company defendants as to cause them to reduce their prices significantly even in the absence of central station competitors (Finding 46, R. 756). In the central station field, the court found the competitive situation such that "from 1957 to 1961, defendant alarm companies' shares of central station subscribers and of revenue therefrom showed a slightly declining trend" (Finding 45, R. 756) and that

> "• • • there is no persuasive evidence that any particular prospective entrant has been unable to begin

operations, or that any specific CSPS firm has failed or been driven out of business. The most that can be said is that some competitors complain of what they regard as unsatisfactory profits." (Finding 45, R. 756)

Having thus disclaimed that the usual indicia of monopoly power are present in this case, the court incongruously concluded that ADT's response to its competition shows that all defendants in fact possessed monopoly power. Judge Wyzanski found it paradoxical that ADT's counsel stressed that ADT "operated 20 '*deficit*' offices in cities with no other central station" (Finding 47, R. 756-57, emphasis in original), and he went on to hold that this "conclusively proves that defendants enjoy national monopolistic power" (*ibid.*).

Subsequent findings rely on ADT's 1955 acquisition of General Alarm Company of Boston following the Department of Justice's "no action" letter (Finding 49, R. 757) and on other ADT acquisitions (none of them in the relevant market subsequent to Grinnell's investment in ADT) as proof that it is unnecessary to examine any other alarm company acquisitions, "if any", because "Enough has been noted to see why it is that defendants have not borne, and cannot bear, their burden" (Finding 51, R. 758). Thus generalizing, the court found *all* defendants guilty of monopolizing the relevant market on the basis of evidence pertaining only to ADT, and not probative of a Section 2 violation by any defendant.

We have already seen that there is no support in this record for the court's holding Grinnell vicariously liable for ADT's conduct. But even if there were, the ADT conduct cited does not prove monopolization. It only indicates that even in cities in which ADT had no central station

competition (or where it enjoyed a 100% monopoly of the CSPS business) ADT was forced to sell at a loss. By the government's own standards, most of these cities are what have been called "natural monopoly" areas for ADT's central stations because they lack the population, business and commercial density to generate enough subscriber revenues to support more than one central station (R. 571-75; D. Ex. MM, R. 3717, 573, 594). In such areas, ADT would have no reason to sell at a loss if central station services constituted a separate market. The fact that it nevertheless conducted deficit operations in those "natural monopoly" towns would seem to be compelling proof of the presence of effective non-central station competition.

The court below thus compounded its original errors (of improperly defining the relevant market, and improperly shifting the burden of proof to defendants *after* the trial) by making its newly-fashioned presumption of guilt conclusive as to all defendants on the basis of acts of ADT which cannot support such a conclusion even as to ADT—and *a fortiori* are not probative of any monopolization by Grinnell.

Each of these rulings was an essential step in the logical process which led the court to hold that Grinnell violated Section 2, and each of these errors requires that that holding be reversed.

IV.

THE DECREE REQUIRES REFORMATION IN ANY EVENT.

We have already stated (at Point I-C above) why we believe that there is neither legal nor factual support for any part of Judge Wyzanski's "three-pronged decree" requiring wholesale divestiture of Grinnell's investments in all three alarm companies and prohibiting any similar investments, enjoining Mr. Fleming's continuance in his

employment, and imposing on defendants and their employees a command to obey the Sherman Act or face a contempt citation. For basically the same reasons, this uniquely punitive decree should not be allowed to stand even if all of the foregoing arguments were to be rejected. Even then, Grinnell should not be left in any worse position than it would have been in if it had not purchased Western Union's ADT stock in 1953 in reliance on the Justice Department's acquiescence in that transaction.

At that time, Grinnell already owned the majority of AFA's stock and 100% of Holmes. Mr. Fleming was Grinnell's president, and he was free to remain so. He and Grinnell's other executives determined that they would not go through with Grinnell's proposed purchase of ADT stock if the Antitrust Division had any objection to it, even if that should mean forfeiting the $625,000 down payment. They submitted to the Department of Justice everything it requested and a great deal of other information, including the 1907 Fire Alarm Agreements. After seven Antitrust Division attorneys had investigated the matter, Grinnell's counsel advised it that the Department of Justice had cleared the purchase of ADT's stock. Only then did Grinnell honor its stock purchase agreement with Western Union—as any businessman acting in good faith would have done, no matter how cautious or prudent he might have been.

In all probability, Grinnell would not even be a defendant in this action if it had not purchased ADT's stock. Its good faith in making that investment, and the government's failure to challenge it until eight years later, highlight the inequity of now holding Grinnell guilty of violating the Sherman Act (for alleged offenses in a market in which it does not compete) on the basis of ADT's market position. At the very least, the lapse of time (indicative of the government's early view that there was no offense) and the inter-

vening investments and expenditures are mitigating circumstances which a court should take into account in prescribing relief. *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 45-46 (1918); *United States* v. *United States Steel Corp.*, 251 U. S. 417, 452-53 (1920). Even if this Court should find an offense on Grinnell's part, then, we respectfully submit that the maximum "punishment" that would reasonably fit the "crime" would be to put Grinnell as nearly as possible in the position in which it would have been if it had never acted on the Department of Justice's acquiescence.

In short, Grinnell should in any event be allowed to keep its investments in AFA and Holmes (or, alternatively, in ADT) and its stockholders should be allowed to retain the chief executive officer of their choice.

V.

THE GOVERNMENT'S REQUESTS FOR ADDITIONAL RELIEF ARE WITHOUT MERIT.

For the foregoing reasons, we do not believe that it will be necessary for the Court to reach the questions concerning possible additional relief raised by the government's appeal. However, in order to reduce the number of briefs herein, the parties have agreed that defendants will file their briefs first, and in them state their position on the government's appeal. We do so below.

The additional relief the government seeks would, among other things: prohibit Grinnell from distributing alarm company stock to Grinnell's stockholders as one method of accomplishing any divestiture that might be required of Grinnell; require ADT to undergo unspecified divestiture; and require all the alarm companies to sell equipment to their subscribers and to limit the term of their subscriber contracts to one year's duration. Of these, only the first

item directly concerns Grinnell, and the others will be left to the alarm companies' briefs.[70]

The trial court stated plainly before (A32, R. 282-83), during (C58, R. 571) and after the trial (C92, R. 697-98) that there would be no post-trial hearing on relief. Yet at no time until its jurisdictional statement was filed in this Court did the government contend that a spin-off to Grinnell's stockholders "will probably be inadequate even to separate control of the four companies" or that it "could serve to perpetuate the existing centralized control" of these companies (p. 14). To support this argument now, the government blandly cites "Standard and Poor's Corporate Records, April-May 1964" to the effect that "Grinnell's management and their families own 30% of the stock of Grinnell" (*ibid.*). Not only is this hearsay *dehors* the record, it is also an incorrect statement which was not repeated in later issues of the same publication which have replaced the edition cited in the government's jurisdictional statement.

The uncontradicted testimony in this case demonstrates that Grinnell has over 5,000 stockholders located in all 50 states, with no stockholder owning more than 2% except AFA (C90, R. 694-95).[71]

These facts should be dispositive of the government's argument, but if matters outside the record are to be con-

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[70] Here we need only point out that, if the government were entitled to any such additional relief, these additional remedial provisions should correspondingly reduce any need to bar Grinnell from participating as an investor in the central station business by retaining its interest in either ADT or AFA and Holmes.

[71] AFA has about 9% of Grinnell's stock (R. 674), which it would probably distribute to Grinnell and its other stockholders prior to any divestiture of Grinnell's interest in AFA.

sidered, the facts of record are confirmed by the Form 10 filing that Grinnell was recently required to make with the Securities and Exchange Commission.[72] In short, this belated argument that there is a substantial concentration of Grinnell's stock in the hands of its management and their families is wholly without merit.

Refusal to allow a spin-off, in the event of any divestiture, would penalize Grinnell and its 5,000 stockholders by imposing a substantial and unnecessary tax burden on them. To illustrate, if Grinnell were required to sell all its alarm company stock and did so at present values, the capital gains tax which Grinnell would have to pay (before any distribution of the proceeds were made to stockholders) would be approximately $20,000,000. If Grinnell were then to pass the proceeds of such sales on to its stockholders, they would then be required to pay further substantial

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[72] This states:

"The following table sets forth information as to the ownership, as of February 26, 1965, of equity securities of the registrant [Grinnell] and its subsidiaries, other than directors' qualifying shares, beneficially owned directly or indirectly by all directors and officers of the registrant:

Title of Class	Amount Beneficially Owned	Percent of Class
Common Stock, without par value, of the registrant	54,428 shares	4.29%
Common Stock, no par value of American District Telegraph Company	200 shares	.03%

"In addition to the holdings shown above, one director is one of three trustees of an estate, in which he also has a one-fourth life interest, and such estate owns beneficially 12,559 shares of Common Stock, without par value, of the registrant, representing .92% of such class of stock.

"Also, wives, children and grandchildren of directors and officers of the registrant own an aggregate of 25,887 shares of its outstanding common stock, constituting 1.93% thereof. All such persons are of full age and such shares are not considered by the respective directors and officers to be beneficially owned by them." (Item 11).

taxes on it, with varying consequences depending on the individual taxpayer's tax bracket.

A spin-off of this stock to Grinnell's stockholders, on the other hand, would be a tax-free transaction, at least until the stockholders sold the shares so distributed (in which case there would be a capital gains tax). In addition, such a distribution to Grinnell's thousands of shareholders would leave the ownership of any divested alarm company in diverse hands instead of in the control of a single purchaser of Grinnell's controlling stock interest, which might well be the result of the forced-sale plan the government now advocates.

Finally, if the divestiture ordered below should be permitted to stand, allowing Grinnell the option of a spin-off would be of the utmost importance to it even if that option were not ultimately exercised—because the mere existence of this possibility would enhance Grinnell's bargaining position and improve its chances of obtaining a fair price on any sale of its alarm company investments to a third party.

Since there is nothing in the record which supports the government's proposal, since it is difficult to conceive of any public interest that might be served by it, and since it is fundamental that courts of equity should not impose unnecessary restrictions or act punitively, it is unworthy of further attention by this Court.

Conclusion.

Judge Wyzanski admittedly prejudged this case, and even sought to justify having done so. He refused to disqualify himself, and he persisted in denying defendants their right to a fair trial.

This denial of due process is evident throughout the record—before the trial, in the peremptory pretrial proceedings; during the trial, in the evidentiary rulings and the atmosphere of the courtroom; after the trial, in the egregious factual errors in the decision and in the draconian decree which would be unwarranted on any view of the facts. In the interests of justice and of maintaining public confidence in the fairness and impartiality of our judicial system, defendants should at a minimum be granted a new trial before a new trier of the facts.

Moreover, the judgment that Grinnell violated Section 1 of the Sherman Act is unsupported by the court's findings and conclusions, or by the record. There are neither findings that Grinnell participated in the "patterns" the court discerned in the activities of the alarm companies, nor proof that any lack of competition among these subsidiaries constituted an unreasonable restraint of trade.

The court based its finding that Grinnell violated Section 2 on an economically-unreal definition of the relevant market which, *inter alia,* excludes effectively competing substitute services. It then concluded that the alarm companies' share of that market gives rise to a presumption of guilt, and applied that presumption to all defendants retroactively after the trial.

At the same time that it announced this presumption, the lower court held that it is conclusive in this case because ADT's response to competitive conditions proves that all defendants have monopolized. The court thus found Grinnell guilty on both charges by considering against it evidence admissible only against one or more of the other defendants, and not probative of Sherman Act violations even as to those defendants.

Accordingly, this case should be reversed and remanded with such instructions for dismissal of these charges, in

whole or in part, or for a new trial before a new trier of the facts, as this Court may deem just and proper.

Respectfully submitted,

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APPENDIX A.

Pretrial Conferences.

Excerpts From Transcript of Pre-trial Conference.

December 18, 1963.

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R. 118 [Mr. Story.] First of all, sir, I would like to talk about the efforts R. 119 on the part of the parties to this law suit to settle the case in accordance with the suggestion of your Honor when we were here last Spring.

Starting in about April of this year and continuing through the summer, we have had several meetings be- [fol. 181] tween the parties in an effort to settle the case. In September the negotiations had reached a point where the defendants submitted a proposed Consent Decree to the government. I think the date of that was September the 18th.

After receiving the defendants' proposed Consent Decree, the government on November the 12th submitted a counter offer of a Consent Decree.

Since November 12 the parties have had two extended negotiating sessions. We have another session scheduled for December 30th of this year.

• • • • • •

I think I can report that we have reached some agreement on some of the issues, but I am inclined to think that the parties are still quite a ways apart. So based on that, your Honor, I thought that, from the government's standpoint, it would be desirable at this time to have a pre-trial conference and generally find out how your Honor would like to handle the presentation of this case in the event we are not able to get together on settlement of the case in the near future.

R. 120 Now, first of all, your Honor, discovery has been completed in this case. In that regard, in accordance with your Honor's instructions, the plaintiff has designated

those portions of the Deposition transcripts which the government intends to offer into evidence.
[fol. 183] The government has also, in accordance with that schedule, submitted to the defendants a list of all documents that it intends to introduce into evidence in this matter, and the government has also submitted a list of witnesses which in this particular case would be Depositions of Witnesses for the most part, your Honor.

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R. 122 [Mr. Story.] Now as to documents, I mentioned a moment ago that the government originally submitted a list, and we have cut that list down considerably, and by January 10 of 1964 the government will have in the hands of counsel for the defendants a cut-down list of documents, and by that I mean, your Honor, they have had notice of substantially all the documents for some two months, so they won't have to deal with a great volume of documents. I will give them a cut-down list by January the 10th.

In addition to that, so as to assist the defendants in forming their objections, to the extent possible the government will submit a list of the issues in this case which it intends to prove, and with that list of issues we will designate the numbers of those documents which we intend to use to support those various issues.

We have indicated to counsel for the defendants that we hope to have that done by January the 10th. I think we will be able to do that, your Honor.

After the defendants have our cut-down list of docu-[fol. 188] ments by January 25th they will submit to the government their objections to the government's documents, the documents the government intends to introduce. Then some time thereafter, along about February 1st, we hope to get together and try to resolve among ourselves as many of the objections to the documents as possible, and then the ones that are remaining we would like the Court to hear in mid-February, if it is possible to get a pre-trial conference at that time.

Generally, sir, that is my interpretation of what we have done, and if I have erred in any way I am sure Mr. Fritz will assist us in straightening it out.

R. 123 The Court. Thank you, Mr. Story. Mr. Fritz, do you want to say anything?

Mr. Fritz. Your Honor, what I have to say is very brief. The conference we held yesterday was most helpful in resolving many of the questions that we had, so far as time is concerned, and I think that Mr. Story has accurately stated what in substance we agreed to.

I think it will cut down the work of all of us and cut down the work of the Court.

[fol. 189] There was one thing Mr. Story did not emphasize today that I understood yesterday he would do, and that is about January 10th they would furnish us a brief of the issues that are tied in to the various documents to be used, and I think that probably still is our understanding.

The Court. Is that correct, Mr Story?

Mr. Story. Yes, your Honor. I stated it poorly, I guess.

Mr. Fritz. As to the documents—they have designated to us some three thousand documents, and I am happy to hear that they are going to cut this down to the figure of four hundred. That will be of great help to me and everybody else in the case. I really had not appreciated that. But I think, sir, that your Honor can see from what Mr. Story has said that we have tried to work with the government so as to cut down any unnecessary work and to stipulate where we can stipulate. We intend to continue that type of program. So that we are in accord, I think, both of us, counsel for Grinnell and myself, representing the Alarm Companies, on this proposed schedule, government's counsel submitted to your Honor this morning.

[fol. 190] I think Mr. Story, in outlining to your Honor what has happened since the general admonition from the Court in January, that we explore the possibility of adjustment, perhaps deprecates what we have actually done.

* * * * * *

R. 124 [Mr. Fritz.] We might not be able to resolve [our problems] on December 30th. But my feeling about this is that it would be unfortunate if all of the time and thought that we as counsel and the officials of the companies who are devoted to this thing should to use the vernacular of the street "go down the drain" without completely exhausting this aspect of the case. I would hope that not only would we see to it among ourselves that we do exhaust it but I would express the hope that if we reach the point where there is still something unresolved, we may have the assistance of the Court in this matter.

I think that is about all I have to say, sir.

[The balance of Appendix A consists of the remainder of the transcript of the hearing on December 18, 1963, and the entire transcript of each of the subsequent pre-trial conferences, without deletions.]

The Court. Does any other counsel wish to say anything?

Mr. McInerney. Yes, your Honor. Denis McInerney representing Grinnell. I felt I should introduce myself because we have hesitated to inject ourselves into the pretrial prior to this time. There is a community of interest among the defendants and it has been well-represented by [fol. 192] Mr. Fritz.

We do have a further thought to add to the presentation. As government counsel has told you, we have now substantially completed discovery in this case. We are at the stage where government counsel has requested that at our next pre-trial your Honor rule on a number of objections. Those objections total over four hundred separate objections to the thousands of pages of Depositions that have been designated.*

* Underlining has been added to the transcripts in these Appendices.

The Court. They do now. Conceivably they will be reduced.

Mr. McInerney. Down to a very few. We may also have R. 125 problems of admissibility of documentary evidence that counsel have designated although they should be fewer in number. However, it seems to us that we are at the stage now, having substantially completed discovery, where, if it is not possible to reach agreement among the parties at this December 30th conference, that the next more appropriate stage, rather than burdening your Honor with ruling on the admissibility of evidence, would be a pre-trial on the question of relief as recommended by the Judicial Conference Handbook, with which your Honor is familiar, [fol. 193] I am sure, having been one of the authors.

The Court. I am not one of the authors but I do know about it.

Mr. McInerney. If I may just quote one sentence from it, your Honor. This recommendation is as follows: After discovery has been substantially completed, particularly in civil anti-trust cases brought by the government, one or more pre-trial conferences should be devoted to the question of the relief sought by the plaintiff.

Now following that recommendation, there is a discussion which indicates this has two objectives. The first is that in a case of this magnitude there will be questions not only of the relevancy of the documents offered by the government but as to whether they are so material that the record ought to be encumbered with them, and in order to help winnow out the wheat from the chaff it is important that the Court know what the objectives of the government are in the case.

Now this prayer for relief, while it does give a number of specific instances of relief that could be offered, that is, requested, it has the usual prayer of "such other and [fol. 194] further relief" and as we know from discussions with government counsel they read much into that.

There is, therefore, an area here for the Court to be informed of what the real issues are in this case, what the substantial issues are in this case, and if settlement discussions do bog down we feel that for the reason that it will aid the Court in determining what is truly material to the issues in this case and what kind of a record is absolutely needed here, and for the further reason of course that it may have the beneficial effect of your Honor's good offices of having the parties reach further agreement, **R. 126** at least narrowing the issues in the case, if not eliminating the need for trial entirely, that this would be the next most appropriate step rather than a pre-trial conference devoted to ruling on the admissibility of evidence.

I would be glad to go into that further if your Honor wishes.

The Court. I will give you an opportunity in a moment. Does any other counsel want to be heard? I would like to know how far there is agreement among defendants' counsel with respect to the suggestion just made because, [fol. 195] if I understand the suggestion in its full scope, it really is an invitation to the Court to participate in a discussion of relief without addressing itself to the merits.

Mr. McInerney. On the assumption of liability, your Honor, we would be willing to have or enter into a discussion on that assumption.

Mr. Story. May I be heard, your Honor?

The Court. Yes.

Mr. Story. From the government's standpoint I disagree wholeheartedly in what Mr. McInerney has suggested to the Court. It would appear to me that this is an unusual suggestion, that the Court get involved in the ordinary hum-drum of a negotiation.

The Court. Hum-drum? It is the whole heart of the matter. Nobody minds an adjudication which is purely declaratory, a slap on the wrist. What people object to is the relief. It certainly isn't hum-drum detail. It is the heart of the matter.

Mr. Story. All right, sir. I agree with your Honor on that. But I do think that your Honor ought to look at this case on the merits so that you can have some indication as [fol. 196] to the type of offense we have here, and only after such time as your Honor has a certain amount of knowledge of the factual situation here could you actually, I think, intelligently participate in a Consent Decree negotiation, and the only way that I know that your Honor could get that information would be to hear the case on the merits and then go into the relief situation.

The Court. Well, I really am rather surprised at this position, both of Grinnell and of the government, but I will allow other counsel to speak. Up to now each counsel has R. 127 taken the reverse of the position which I would have anticipated.

Mr. Fritz. My position on this, if your Honor please, is a very simple one. We do not of course agree with the government's view on liability in this case, and I don't suppose we ever will until we get some adjudication one way or the other, but we have a practical approach to this thing. We all have to live and we don't think that living in the confines of a case like this for most of our lives constitutes living.

The Court. The lawyers or the companies or both?

[fol. 197] Mr. Fritz. Everybody. It probably is less important from the lawyers' aspect than the companies. I am really thinking about the client. I think the practical necessities of living for corporations and the people dependent upon the corporations require that we look at this thing in a cold, hard way and, therefore, I would welcome frankly a consideration by the Court of the relief aspect of this case.

While it is not done every day in these cases, it has been done in other cases, and I don't think that your Honor has to know every nook and cranny in this case in order to be of the help that your Honor can be.

I think the matters concerning relief could be perhaps adequately briefed with an outline of the information to

the Court so your Honor would have a clear picture of what is involved. There are a few complicated questions here, and I think they are going to be quite few by the time we get through.

If we can cut these knots with the aid of the Court, I think it would be a much better conclusion for everybody concerned than to spend a month or five or six weeks that [fol. 198] would be involved in the trial and with the risks of everybody involved, including the government.

The Court. Thank you. Does anybody else wish to be heard?

Mr. McInerney. I would just like to add to my remarks a footnote taken from the Judicial Conference Handbook citing for the recommendation I have read the West Coast Oil Case in which the Court did the very thing that we think would be appropriate here in the event that we are **R. 128** not able to reach an agreement. I am sure that your Honor is well aware that this is not an extraordinary suggestion as government counsel would have us believe.

Thank you.

The Court. Does anybody wish to say anything? I am going to deal first with Mr. McInerney's suggestion and then with the other matter. If the parties are themselves unable to adjust the matter, as Mr. Fritz says, by December 30, 1963, I believe that the most advantageous course would be for the government clearly to indicate, in accordance with Mr. Story's proposal, exactly which two thousand more or less pages of the Depositions the government proposes to offer in its case-in-chief, exactly [fol. 199] which four hundred more or less documents the government proposes to offer and a brief correlating those pages and documents to what the government regards as the essential or more important issues in the case.

It also would be helpful if at that time the government would outline in relatively short compass, I mean twenty to fifty pages, its over-all view of the basis of liability of each and all of the defendants. Also at that stage I

should like the government to prepare a quite specific draft of the relief it would seek were it to prevail. That is, I would like to see the text of the operative provisions of the decree. I am not so much concerned with the preliminary recitals. And after all of those documents have been prepared I would then be ready to accept from defendants any brief that they chose to submit with respect to the facts in so far as facts would be helpful in a conference relating to relief. That is to say I would like them to have the opportunity of preparing a twenty to fifty page summary of what they regard as the facts with respect to liability. And also, if they have any views with respect to relief, I would welcome from them a brief with respect [fol. 200] to relief. At that stage I would be quite prepared to hold a conference directed primarily to problems of relief rather than to problems of ruling upon the admissibility of evidence or other objections.

It is my view that this is not only in accordance with what is quite customary practice but would be very helpful in this situation. Needless to say, in any type of pre-trial R. 129 settlement discussion each side states to the Judge what is its view of liability, if any, and in the simple cases, after such an exchange of views, it is quite common, where the relief sought is solely in dollars and cents, for each party to express its view of an appropriate dollars and cents recovery and for the Judge to nudge the parties to agreement by taking into account their views, which may not necessarily be his view, of the possible liability.

I see no reason why that is not an equally good pattern where the matter is more complicated and involves probably no monetary relief but entirely equitable relief, if any equitable relief is proper.

If, for example, the government were to disclose a pat-[fol. 201] tern of violation of law which the Court said were to be proved this Court would take Draconian measures of great severity, one basis of possible adjustment would be presented.

If, on the other hand, the Court indicated that even if the government proved everything that it set forth in its interpretation of the facts the Court would direct only moderate relief of such-and-such a pattern, that indication by the Court might also lead to an adjustment or Consent Decree.

In other words, I think what is reasonable to do under the circumstances is to allow all parties to have an awareness of how far the Court would be likely to go if the facts were as strong as the government says they are.

In such a situation it is quite true that the defendants are running some risk because the Court necessarily in talking about such matters will not know whether the government's contention in interpreting the facts is correct or the defendants' interpretation of the facts is correct or some middle course is correct, and presumably, if the Judge makes any suggestion, he will have to make it on [fol. 202] the basis of the strongest possible showing of the government. That is to say, if the government believes that is has very strong evidence with respect to violation and points to particular pages in the Depositions and particular documents and particular answers to interrogatories or what-not, at the stage of the discussion which I foresee under Mr. McInerney's proposal, I would have to **R. 130** go very far in assuming that there is something to what the government says. I cannot assume that the government's *prima facie* case is going to be demolished.

Mr. McInerney. We have no intention that you would, your Honor.

The Court. I do not see what loss the government can sustain, and if the defendants want to find out how I feel about the matter, if the government's case stands uncontradicted, that is up to them.

Mr. Fritz. Well, what your Honor is saying now happens so often every day in litigation, in matters of lesser importance, that I still think it is a practical approach.

The Court. All right.

Mr. Story. Your Honor, may I be heard just a moment? [fol. 203] The Court. Yes.

Mr. Story. I am particularly concerned, your Honor, about your Honor engaging in the settlement of this particular case, having no more of the facts before your Honor than I am going to be able to put into a document of 20 to 50 pages.

The Court. If you can't put it in 20 to 50 pages, you won't win in this Court. I tell you now I am firmly persuaded of the correctness of the great praise I heard of George Wharton Pepper by a Chief Justice of the United States for being able in eight pages to put the whole of one of the most complicated cases of which I know anything, and I am equally persuaded by Mr. Justice Brandeis' statement that any case which could not be stated orally in thirty minutes to the Supreme Court was not a case which could be won in that Court.

Mr. Story. Well, your Honor, I would just like to call to your Honor's attention that it has been my intention, and I have stated it in this Court before, that I think that the combination that we have here in this particular case is one of the most predatory, vicious monopoly situations we [fol. 204] have had in fifty years.

The Court. If you use those adjectives you are wasting pages. I can come to the conclusions with respect to characterization, and eliminate all adjectives of that kind and you will have more chance of persuading me. Every time I see such an adjective my hackles rise and I tend to be- R. 131 lieve there is nothing but rhetoric in the government's case. Is that clear?

Mr. Story. Very well, your Honor.

The Court. All right. Is there anything else?

Mr. Fritz. Well, I have just one question. I am not clear as to what time element your Honor has in mind for the various suggestions which the Court made.

The Court. I was coming to that.

Mr. Fritz. I'm sorry.

The Court. I think that the best thing would be to have you gentlemen spend the balance of the day, if it is required, to draw up an Order incorporating the general lines of my suggestions and making more specific particular dates. I will meet your convenience as far as time [fol. 205] goes, but I have no idea how long it will take you to prepare the kind of briefs to which I referred. I am sure that the government ought to prepare its briefs first and the defendants out to prepare their briefs afterwards and the government, if it finds it necessary, may make a short written reply to the defendants' briefs. I will allow you gentlemen reasonable latitude to fix the date and you can pretty much fix your own date for my hearing it. That is to say you can suggest a week during which you would like to be heard and I will assign a day for hearing it.

I would think that what we are really dealing with under these circumstances is for the government and the defendants for the moment to assume that the only matter before the Court at the end of the trial would be the government's evidence, which, of course, is an unrealistic assumption, but which is the basis on which, as I understand it, you want to find out what kind of relief I would be likely to allow if the government's case stood virtually uncontradicted. Am I right? That is what you are seeking?

Mr. McInerney. That is what I had in mind, your Honor, [fol. 206] yes.

The Court. Now, gentlemen, you will be able, won't you, to draw up a particular schedule setting forth exactly what dates are convenient to you and what date you would like me to hear you, and you will be able to spell out what is to be done on each date, won't you?

R. 132 Mr. Fritz. Yes, your Honor.

Mr. Story. Yes, your Honor. Do you want that done today?

The Court. Why leave Boston without doing it?

Mr. Story. Sir?

The Court. Why leave Boston without doing it? I could do it in half an hour but I assume that you could do it in a little longer time because there are more of you.

Mr. Story. I thought, in order to follow your Honor's instructions, if we had a copy of the transcript to assist us in the matter——

The Court. Oh, I don't think I have said anything that is difficult. It is a question of on what dates you will present the pages of the transcript, the list of documents, any [fol. 207] other pre-trial material, such as answers to interrogatories, and on what date you will present a correlation of those matters to the principal issues in such a way as to involve a statement of facts as the government views it and on what date you will present a statement with respect to the relief you seek in specific terms, on what date a reply document or documents will come from the defendants with respect to their view of the government's evidence and their view of appropriate relief, if any, and on what date you will on behalf of the government file any reply that you seem to find necessary, and in what week you want me to hear argument or discussion with respect to possible relief if the government's evidence were to stand uncontradicted.

Isn't that all—just to put down those dates? I think that can be done very quickly.

Mr. Story. Very well, your Honor.

The Court. All right.

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[Caption omitted.]

ORDER—December 18, 1963

R. 133 WYZANSKI, D.J.

The parties having appeared by their respective attorneys at a pretrial conference held herein on December 18, 1963, it is hereby Ordered:

Pretrial Conferences.

(1) On or before February 1, 1964, plaintiff shall serve upon defendants and file:

(a) an exact designation of all pages or portions of pages of transcripts of depositions and an exact designation of each document upon which it intends to rely in its case-in-chief;

(b) a statement of the main issues to which each document primarily relates; and

(c) a copy of plaintiff's trial brief containing appropriate references to transcripts of depositions and to documents.

(2) On or before February 14, 1964, plaintiff shall serve upon defendants and file a brief, not in excess of fifty (50) pages, stating its views as to the basis of liability of each defendant, together with a specific draft of the relief sought by plaintiff, including the text of the operative portions of the decree plaintiff would request in the event it prevails.

(3) On or before April 6, 1964, defendant Grinnell and the defendant Alarm Companies shall each serve upon plaintiff and file briefs, not in excess of fifty (50) pages each, in response to plaintiff's brief stating their views [fol. 210] with respect to the relief which would be ap-
R. 134 propriate in the event plaintiff prevails, together with specific provisions of a proposed decree.

(4) On or before April 13, 1964, plaintiff shall serve upon defendants and file a reply brief, if plaintiff be so advised.

(5) On a date subsequent to April 13, 1964, subject to the Court's convenience, a pretrial conference shall be held herein for the primary purpose of discussing the relief which would be appropriate in the event plaintiff prevails.

D. J., United States District Judge.

Pretrial Conferences.

Transcript of Pre-trial Conference.

May 28, 1964.

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R. 252 [fol. 349] The Court. All right. Now the pre-trial conference. United States against the Grinnell Corporation a great many pending matters of one kind and another, some in the form of motions. I will give the United States a chance to say anything in connection with any pending motion it wishes to press.

Mr. Fritz. May it please the Court, before we begin may I have the privilege of presenting to the Court Mr. Robert L. Donnelly and move his admission to the Bar of this Court. He is a member of the State Bar of New York and is general counsel for one of my clients.

The Court. You are welcome to participate. I don't think I will grant the motion in exactly the terms made but you may participate in this case.

R. 253 Mr. Donnelly. Thank you very much.

The Court. Now what does the United States press? The secrecy motion is on the other side so you don't have to press that one.

Mr. Story. Well, your Honor, I really have nothing to press here today.

The Court. All right. I will give the other side a chance. Does the other side want me to impose clearance on certain documents here?

Mr. McInerney. Your Honor, we merely requested that [fol. 350] publication of these documents be postponed for some period of time in view of the nature of the offers made therein and the impact their publication would have on both the business of our clients and the employees of our clients. The reasons for this are obvious, I think. Your Honor knows what is in our proposed counter-offer. I don't see any reason why it should not be granted. I must say I didn't quite understand the government's letter with respect to it.

The Court. Do you want to say anything, Mr. Story?

Mr. Fritz. May I say, apropos of that, that we felt due to the state this matter was in that it could prove embarrassing if the matter came to the attention of our competitors. I don't like to get into controversy but Mr. Story's letter indicates rather plainly he felt we had breached a prior arrangement whereby the secrecy would be preserved.

The Court. I am not adjudicating anything on that. The only question is whether I shall in some way impound or hold secret documents which have been filed here That is the only question that is before me.

Mr. Fritz. I join in that application.

The Court. Do you want to be heard, Mr. Story?

[fol. 351] Mr. Story. Yes, your Honor. I am certain your Honor is aware that in connection with the antitrust laws the Congress back in the early 1900's passed a specific act relating to the antitrust laws called the Publicity and Taking Testimony Act.

The Court. What has that got to do with this?

Mr. Story. Well, your Honor——

The Court. Nothing. Right?

Mr. Story. Well, it has this——

The Court. Nothing.

R. 254 Mr. Story. Well, I disagree with your Honor on that.

The Court. Show me the statute that relates to it, and then I will apply it.

Mr. Story. I know of no such statute.

The Court. All right. That is all I asked you. Is there any other argument of a non-statutory nature that you are addressing to me? I hear none. I deny the application to impound. I have no private ears in any suit. All right. The next matter.

Mr. Story. Your Honor, in that connection I would like to bring up at this time, because I know your Honor has received some communications in connection with it, the [fol. 352] fact that at the first pretrial conference in this

matter the defendants before Judge Sweeney moved the Court to seal the depositions taken in this matter. At that time Judge Sweeney didn't ask for my views on it, but I didn't make any statement in opposition to it because the defendants at that time had taken one or two depositions and it was found that the non-defendant companies were greatly reluctant to disclose any of their business matters, especially their volume of business, which is necessary in a monopoly case. So Judge Sweeney at that time ordered that all depositions in this matter would be sealed. In depositions after that, in an effort to get the witnesses to cooperate and not have to go before a local Federal District Court every time we took a deposition, Mr. Fritz started off and he made the statement in the beginning of the deposition that these depositions had been ordered sealed, that the depositions and the contents of the depositions would not be disclosed to anyone other than the attorneys charged with preparing the case for trial.

That went on for several months, during which time the Government took several depositions which it had noticed. The Government——

The Court. If I understand you correctly, you failed to make any application to Judge Sweeney, and you certainly [fol. 353] never made any application to me, to vacate Judge Sweeney's order, with respect to this matter, and the deponents testified with the representation accurately made to them that these were documents which would not be disclosed except under certain circumstances at a later stage of the trial; is that right?

Mr. Story. Yes, sir.

R. 255 The Court. That is all I have to hear. As far as I am concerned I am not interested in acting on it now. I assure you that had you made application at an appropriate time to me before any third-party or deponent had testified, I would promptly have taken what I regard as desirable action, but now deponents having testified under an assurance, which you did not seek to have vacated, I am not going to disturb it.

Mr. Story. The only point I was trying to make——

The Court. That is all there is to it. It has to do with third persons and their justified reliance upon an order which you did not seek to have vacated.

Mr. Story. The only thing I am trying to say, your Honor, is that it is my understanding now that some of this information has been made available to officers of the defendants.

The Court. I don't know anything about that. But I am [fol. 354] going to leave the matter as it is because the deponents testified under an understanding which you didn't seek to vacate. Is there anything else? Is there anything other than setting the date for trial?

Mr. McInerney. Your Honor, at our last pretrial conference we discussed devoting this pretrial conference primarily to the question of relief. If your Honor will recall——

The Court. Is there any use in my talking about it? Are you near enough so that I can do anything? Or hadn't I just better hold the trial and get it over with? It is not going to take very long. I know that.

Mr. McInerney. Your Honor, it won't take very long for the plaintiff's case to go in.

The Court. Nor for the defendants' either, I assure you.

Mr. McInerney. Well, if I may respectfully disagree——

The Court. You may disagree but I will decide it.

Mr. McInerney. Well, I would like to point out to your Honor that if we were to go to trial at the present stage of this matter, we would be going to trial on issues far beyond those contemplated by the pleadings in this action [fol. 355] because of what had gone before leading up to this pretrial conference.

If I may go back for a moment, your Honor. The purpose that we had in mind in suggesting this at this time was that the government had completed its pretrial discovery, it was very substantial indeed. There were about **R. 256** 100 depositions taken in about 35 cities. They saw about a half-million of our documents that were produced

and reviewed by them. We spent thousands of man-hours in answering interrogatories. And from all this material they culled all of that bulk of evidence down to a fairly, relatively insubstantial amount in comparison to what they had to work with. But the fact is that they have designated about 2,000 pages of deposition testimony, and about 1,300 pages of documents, and that, together with certain stipulations of fact that we have entered into since the last pretrial conference, is to constitute their case-in-chief, because the stipulations eliminated their need for any live witnesses in this case as far as the government is concerned.

So now we felt we were in a posture so that the Court could determine rather readily what the real issues are in this case, and we suggested this conference with two purposes in mind. The first one, quite frankly, was we thought [fol. 356] that if your Honor would indicate the relief that might be appropriate in this case that that would help both sides to come to a better understanding.

The Court. I don't think it would help very much.

Mr. McInerney. Well, your Honor, I think it would help both the plaintiff and the defendants to know what is really at stake here in this trial.

The Court. I assure you that you would not be helped by anything I would say. You would do better to get together with the government rather than run the risk of what I would say from what I have seen. Let me just assure you of that. And I mean every word, and you can underline that four times.

Mr. McInerney. We had in addition to that purpose, your Honor, a purpose that had to do with the possibility that there might be a trial and that this procedure would not result in a consent decree and that was the narrowing of the issues or the elimination of some of the issues in this case.

The Court. The case is set for trial Monday, June 15th, the government to proceed.

Mr. McInerney. Your Honor——

[fol. 357] The Court. There is no use in discussing it with me. I have read enough to know that if I have to decide this case on what I have seen from the government you will not be in a position at this stage to agree to it.

R. 257 Mr. Story. Your Honor, may I say just one thing. As your Honor knows, the government has turned its entire case over to the defendants. Now the government would like at a very early date the defendants to turn over to us those documents that it intends to use in its case.

The Court. I am going to do nothing except listen to your case beginning the 15th of June.

Mr. Story. Very well, your Honor.

The Court. The trial is to begin on the 15th of June. There will be no delays. Nothing will prevent it except death or serious illness.

Mr. Fritz. Notwithstanding my understanding of what your Honor has just said, may I just ask this question. There are unresolved as between us many, many objections.

The Court. I am sure.

Mr. Fritz. Your Honor is aware of that.

The Court. I know. I am going ahead and hear the case. As far as I am concerned, it is going to be continuously tried until disposed of.

[fol. 358] No delays, postponements or further method of avoiding the impact of this Court. The 15th of June.

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Transcript of Hearing on Motions.

June 3, 1964

* * * * * *

R. 272 [fol. 378] The Court. United States versus Grinnell, et al. Who wants to speak on the Motion?

Mr. Fritz. I beg your pardon, sir?

The Court. I said: who wants to speak? I guess you do.

Mr. Fritz. I would like to. As your Honor knows from the papers that were filed yesterday, this is a Motion by

the defendants asking your Honor to vacate the decision made on May 28th to set this case for trial on June the 15th, and also we are asking for an order further limiting the issues on the trial.

Now I would like to address myself to the first branch of this Motion very briefly and ask Mr. McInerney, if your Honor would be good enough, to talk about the question of limitation of issues.

We have come up here so promptly after Thursday be- R. 273 cause, frankly, we are very grieved and disturbed by the order of this Court setting this case down for June the 15th. We think it constitutes a very serious impairment of our position.

May I take your Honor's mind back to December 18, 1963, and which is reflected in the transcript attached to my papers marked Exhibit A. Very briefly that transcript indicates that we all came here to discuss two segments [fol. 379] of this case. The first dealt with pretrial procedures which Mr. Story outlined, which had been the subject of discussion between him and myself and our respective staffs on the prior day.

It covered matters of how we were going to handle the voluminous objections to deposition material which had been selected by both parties, the objections to documents, the designation of documents, and how they were going to be resolved, and if we could not resolve them among ourselves how they could be resolved by the Court.

Then we proceeded from that to the other aspect of the case, namely, the question of submitting to your Honor our respective proposals concerning relief and briefs in support of them, having a two-fold purpose in mind; one, perhaps to limit the issues, if that was the best we could do, and the other to see whether or not we could arrive at an adjustment of the case, because we had spent so many months among ourselves with government counsel trying to reach that result. It seemed to me that at that hearing your Honor embraced the latter suggestion with,

if I may use the word, enthusiasm, and your Honor directed that we put that in the form of an order, which we did on that day.

[fol. 380] That order, as you know, provided for nothing except the treatment of the question of relief, and it laid out a schedule for briefs and a schedule for proposals on both sides.

We thought, frankly, that that was a matter of terrific importance in this situation, and the assignment of that aspect of the case to us was one that became an engrossing matter with us. We devoted our full time to it, myself and my staff, and I think your Honor having the briefs of defendants will see that they reflect a great deal of indus-

R. 274 try and a great deal of work with regard to some complicated questions and which involved a great many discussions with our people regarding the extent of relief.

And so we came in here and attempted to follow up that order, in the best of good faith, with the sincere hope that we were going to make some progress. We felt there were some things that the government was asking in this case that were beyond the pale of an antitrust case.

For example, I thought that the national account demands that the government made had no antitrust implications. I thought that the pricing they sought to get in a non-competitive area to be governed by prices [fol. 381] in a competitive area, for example, was another one, and there are others.

I thought that that might lead at the very least to a minimization of the amount of work that we would all have to do on the trial of the case.

Your Honor, having read the briefs and proposals, reached the conclusion, and that is not the subject of any criticism on my part, your Honor exercised judical judgment in deciding, as I read the transcript of last week, that the parties were so far apart that your Honor felt that there was not anything that could be accomplished in that quarter. That was a matter of great regret to all of us.

Nevertheless, may I point out that the order of December 18 did not concern itself whatever with the question of the disposition of pretrial matters. That was left, as I saw it, and I think other defense counsel and possibly government's counsel, that was left in abeyance pending determination of our relief aspects and submission of briefs to this Court on that subject.

Now nevertheless, on November [*sic*, should be "May"] 28th your Honor said very plainly that the relief aspects of this case no longer concern the Court, so far as ability to do anything about it, and your Honor set the case down for the 15th of June. [fol. 382] That left us in the position where we had still a lot of work to do with regard to this trial, which we had hoped might be eliminated in whole or in part by the procedure we had engaged in for the prior five or six months.

This matter of objections to testimony, depositions and documents is not a purely technical one nor is it purely R. 275 mechanical. There is a great deal of hearsay material, for example, that has been selected in these deposition and documents. If I have to call witnesses from various parts of the United States to meet it, I will have to have them here. If there had been rulings or an agreement on them, or the time to do it, and those objections no longer existed, I would not have to go to the point of calling witnesses.

And so we had to defer a certain amount of our final preparation, if I may put it that way, until these pretrial procedures had been resolved. Now we find ourselves in the position where it is almost impossible to do it in a period of two weeks.

I would like to say to your Honor, and I think your Honor may have observed it, that this case has been pursued with diligence by both parties. This case started in April of 1961. We began our depositions in July of that [fol. 383] year, and there has been no delay that I am conscious of that was imposed by one party on the other, except for this period from December to now, when we were chiefly concerned with this question of relief.

And so, frankly, I find it difficult to see why there is this great urgency, that the matter must be disposed of on the 15th of June. I am not asking for any great length of time. I am not seeking delay for delay purposes. But I am asking that your Honor, instead of giving us two weeks to get ready to come here to try the case, to give us two months, and I think that that is a reasonable request.

Frankly, I am not supposed to be an expert in this field of antitrust, but I have done a great deal of reading and I have done some work of this kind, and I have never seen a monopoly case, a Section 2 case, set down for trial with a volume of material as we have here on two weeks' notice. It strikes me as a little unusual.

Now may I say this from a personal point of view and it also weighs upon my clients' interests. When your Honor made the announcement last Thursday that this case would go to trial on June 15th and that there would be no further [fol. 384] discussion of relief for one of the few times in my life in this Court Room I was speechless, and I should have said to your Honor, as I know your Honor would have understood, that I am not in the fortunate or unfortunate **R. 276** position of Mr. Story, who has one client, as I understood him to say, one case. I have a number of clients and I have a great many interests to defend.

And at the time your Honor made this pronouncement last Thursday I frankly did not have it in my mind that I have been directed to go to trial in the Surrogate's Court, Nassau County, on the 10th and the 11th of June, and I have got to prepare for that. I am in the District Court, as my affidavit shows, in another case in June, in the Southern District of New York.

One of my partners called my attention yesterday to a third matter, an estate matter at the end of June, which I had completely forgotten about. I do not play it quite that close.

And so, those are matters that have an impact upon my client in this case because I have got to do something about the protection of the interests of these other clients.

[fol. 385] Now then finally we come down to the witness situation. I made a quick or had a quick telephone survey made on Friday as to the whereabouts of some people I want to use at this trial. I find that one Price Waterhouse partner, who has been working on some of this material, is in Europe and he won't be back in time. Yesterday I discovered that the economist, with whom we have been working and intend to call, will not be available until the end of June. I have not got that in my affidavit because I did not know it at the time I drew the affidavit. I drew this on Friday morning, with some revisions coming up finally on Monday. And so, for all of these reasons I am asking your Honor to be kind enough to take all of these things into consideration and to give us reasonable opportunity so that we can feel that we as counsel have not been derelict in protecting our clients' interests and that we had not improperly relied upon the settlement period not to do the final preparation work for this trial, which we could have done, I suppose, concurrently with this, but it did not seem right to impose that burden on the clients, if there was some hope, as we sincerely thought there was, of making some progress.

The Court. Mr. Story? I assume nobody else wants to [fol. 386] say anything on the Motion with respect to delay. Or do you want to, Mr. McInerney?

R. 277 Mr. McInerney. No, thank you, your Honor. I will sincerely join in everything that Mr. Fritz has said.

The Court. All right.

Mr. Story. First of all, your Honor, I intend to speak very briefly. I would like to correct the record. We have three cases instead of one, your Honor, and Mr. Morrison and I have been pursuing all three of them vigorously.

In that regard, your Honor, I had an opportunity to glance at the papers that were submitted to the Court starting about three minutes before your Honor came into the Court Room, and I noticed that——

The Court. Do you want more time?

Mr. Story. No. What I have to say I can say right now, your Honor.

The Court. All right.

Mr. Story. One of the reasons proposed by the defendants was to the effect that some of counsel had planned a vacation. I would like to state for your Honor's information that I have not had a vacation in three years. I lost my entire annual leave last summer.

[fol. 387] The Court. Do you need a lawyer?

Mr. Story. I think so, your Honor.

Mr. Fritz. Could I just say that I and my staff are lined up with Mr. Story, too. We haven't had a vacation in the last three years.

The Court. You ought to be a Judge; it's much better.

Mr. Story. First of all, your Honor, I would like to let your Honor know we oppose vigorously this motion. I think that the reason Mr. Fritz has stated here today as a reason why the Court should vacate its order is completely devoid of merit. I would like to summarize some of the things that have happened in this case and to bring you up to date on what has actually occurred.

As your Honor knows, this case was filed over three years ago. Now beginning shortly after the case was filed, the defendants undertook a very vigorous discovery program. In fact, your Honor, I know of no such extended program of discovery in any other antitrust case that I am aware of within the last few years or recent years.

Now in accordance with schedules set by your Honor over a year ago, the defendants have had the entire evi-
R. 278 [fol. 388] troduce into this case since mid-November. Again, your Honor, in accordance with your order, by at least February the 1st the defendants have had our trial brief in which we have clearly stated the issues. We have quoted extensively from their own documents.

All of this talk about clarifying the issues, as far as I am concerned, the government has already clarified them,

briefed them and detailed them and went into great deal for them.

I would like to call your Honor's attention to the fact that over a year ago, when your Honor was making out a schedule for the conclusion of discovery in this matter, your Honor at that time instructed the government to turn over its documents, witnesses and so forth, and tentatively set this case for trial in early November, a year ago. Now certainly that ought to be enough notice to these defendants so that they would have been prepared.

Now, sir, Mr. Fritz spoke at length about the objections. It is true that back in December I did propose to your Honor that each side exchange objections to evidentiary matters which we intended to introduce into Court. Since that time we have received their objections to the testimony in the depositions.

[fol. 389] I must say, your Honor, that Mr. Morrison and I spent long hours studying those objections. First of all, there are so many of them. There are two or three to each page. And ninety-nine per cent of them are so unfounded that I think it would be a complete waste of time for us to try to get together with them. Recently they have submitted their objections to our documentary evidence. The same would apply.

Now, as far, your Honor, as any delay in this case is concerned, with the further possibility of settling the case, I think that would be a complete waste of time. For over three years, and starting and continuing for about four months before this case was filed, extensive consent decree negotiations have been entered into. Literally days have been taken up on this matter. And the parties are further apart now that we were some time ago. So I think it is a complete waste of time in that regard.

Now, lastly, your Honor, I would like to bring up one other thing, which I think is the most important reason R. 279 why this case should go to trial as quickly as possible. The reports that I have from the field for the little, small,

weak competitors of these defendants—this case was filed [fol. 390] over three years ago—it is my information from the field that what I call predatory practices have increased intensely since that time, and I think it behooves all of us, your Honor, to bring this case to a trial and get some remedies or get it disposed of just as quickly as possible. That is all I have to say, your Honor.

The Court. The Motion to Delay is denied. The trial will begin, as I stated, on the 15th of June.

Mr. Story. Your Honor, there is one further thing. I wrote your Honor a letter on Monday. I don't know whether you received it or not.

The Court. No. I wish you would undertake to reform the mail——

Mr. Story. Sir?

The Court. I wish you would undertake to reform the mail procedures in the Department. It takes forever to get any communication out of you, either originating with you or responding to me.

Mr. Story. That is correct, your Honor. It is four or five days before I get it, but I can't do anything about that.

The Court. I know.

Mr. Story. The suggestion I would have to make, your Honor, is that at the end of next week, and I would [fol. 391] suggest Friday, that we meet with your Clerk and have the documents in this case marked for Identification so as to save time.

The Court. May I suggest to you that the best way for you to do that is to come up by agreement with the other side and go through the documents and identify the documents but nothing more than identifying the documents, and giving them numbers. And there is no suggestion that I am going to rule on their admissibility at that time. But it would be quicker to refer to them by numbers.

You can send up a young clerk from the Department of Justice and the defendants can send up the youngest boy they have got around. It is only a mechanical matter of

marking them for Identification. There is no commitment by anybody either to introduce them or to waive objection or anything else. It is just for ready reference.

R. 280 Mr. Story. That is right, your Honor. That is my suggestion.

The Court: Yes. I think that is a good idea. Anybody, even a secretary can do it from the office. It does not require anyone of any special competence.

Mr. Story. There is one other matter of procedure, [fol. 392] your Honor. On the depositions as I mentioned one other time, some of these depositions run to 300 or 400 pages. The government has only designated some 20 to 30 pages and the defendants have cross-designated a few pages.

In an effort to go to trial at this time my suggestion would be, as far as the introduction of deposition transcripts into evidence, would be, and as far as the government is concerned we have already filed a page and line designation of each of those depositions with the Court, and it is my suggestion for the convenience of the Court that the Court reporter be allowed to take those references and copy from the original depositions those portions so that your Honor, when you read it, you will have everything in three or four volumes rather than have a stack of depositions.

The Court. Why don't you have the Department of Justice do that?

Mr. Story. I suggested that at one time, your Honor, but I am running out of time.

The Court. Well, it is much easier for the Department of Justice to do that and have it verified by defendants' counsel and then you submit it that way. It would be much easier.

[fol. 393] Mr. Story. That is what I suggested in December, your Honor. I am afraid that I may not have time. Secretaries are on vacation.

The Court. Well, there are all kinds of mechanical aids at just as cheap rates as here. It is no cheaper to have it

done by the Court reporter here, not a penny cheaper, and I am sure that Mr. Duffey is not looking for that kind of business.

Mr. Story. I will do everything I can to have that done, your Honor.

[fol. 394] The Court. Good. Do it in Washington and have it checked.

Mr. Story. Very well, your Honor.

R. 281 The Court. All right. By the way, you are going to want daily copy, gentlemen, when the trial begins?

Mr. Story. Your Honor, as far as the government is concerned, we will not require daily copy until——

The Court. I assume the defendants will want daily copy?

Mr. Fritz. Yes, your Honor.

Mr. McInerney. Yes, your Honor.

Mr. Story. During which time the live witnesses are on the stand the government will want daily copy.

The Court. You will have to make arrangements now with Mr. Duffey because he has got to make arrangements to get assistants.

Mr. Story. Very well, your Honor.

The Court. I understand the defendants are going to want daily copy anyway; is that right?

Mr. Fritz. That is correct.

The Court. You tell Mr. Duffey how many copies you want so he is able to make all the arrangements.

Mr. Story. Very well, your Honor.

[fol. 395] Mr. McInerney. May I be heard, your Honor?

The Court. Yes.

Mr. McInerney. Your Honor's ruling on the first branch of our motion makes the second one even more serious as far as we are concerned. That motion is to limit the relief issues to be tried herein to those raised by the pleadings so as to eliminate what we consider the extraneous issues raised by the government's proposed judgment herein.

The purpose of this is two-fold. I don't need to remind your Honor that the public policy favoring settlement of litigation has been embodied in Section 5 of the Clayton Act and that consent decrees are eliminated from the prima facie effect of Section 5. So that Congress has in effect given defendants the right, if you will, to capitulate to government demands.

The Court. Yes. I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial. You have invited me, therefore, into what I regard as, from your point of view, a rather undesirable situation. I think I made that clear at the beginning. I have told you that, forced by you to look, my views are more extreme than R. 282 [fol. 396] those of the government; and I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases. Is that clear?

Mr. McInerney. Yes, your Honor. I would like to make clear from the defendants' point of view, your Honor, that your Honor's statement seems to give some status to government demands that are far beyond what the complaint requests.

The Court. I am not going to engage in any bargaining or discussion with you. I am not going to limit anything at this stage, not a thing.

Mr. McInerney. May I just point out two things, your Honor. We do not believe it is consistent either with the Congressional policy of permitting defendants to capitulate to the government demands, which must be the demands in the Complaint, nor consistent with principles of fair play to permit the government to raise the stakes just before the case goes to trial.

The Court. It isn't just before. Now anyone who looks at this record will say that Mr. Story did not exaggerate

by one jot the situation. I have been patient beyond my [fol. 397] nature, and all I can tell you is that, so far as I am concerned, you are now going to experience what other litigants experience in this Court: justice which I hope is fair, is prompt, is thorough and leaves few shreds for others to worry about.

Mr. McInerney. I respectfully disagree both with your Honor's statement and Mr. Story's statement to the effect that it is not at the last minute. Mr. Story says that he clarified the issues over a year ago, and this is not so with respect to the relief requested. We knew that some of these demands for relief would be made but not all of them.

The Court. That makes no difference. I determine the relief. I don't think you need worry about the government. If this case is tried, I won't even ask anyone else to draw the decree. I will do exactly what I did in the United Shoe Case, which is I will hand down on one day the Findings, the Conclusions, the Opinion and the Decree. I do not follow the practice of allowing litigants in my Court **R. 283** to do the Judge's business of writing the decree. Is that clear?

Mr. McInerney. Yes, your Honor. But we had thought that when the complaint requests certain specific relief [fol. 398] and when it says, for instance, that a corporation owning three other corporations or a controlling interest in them is to be divested of one, if the government prevails, that that is wholly inconsistent with requesting divestiture of all three, for instance, or when it says that subscribers may have title, will the Court permit subscribers to take title?— then to insist that subscribers must be forced to take title is inconsistent with that prayer. And so, we are faced with a new set of demands in effect from those that are in the Complaint.

The Court. May I again say that the government will not write the decree; I will write it. And you will engage in no bargaining with me now or later. Is that clear?

Mr. McInerney. Yes, your Honor.

The Court. Thank you.

Mr. McInerney. I had intended to point out several different instances in which the Complaint was inconsistent with the government's present position. I take it from your Honor's remarks that that would be to no avail particularly.

The Court. I don't care if you and the government get together on the decree, but let me make it one hundred percent clear that if I try this case I will write the decree [fol. 399] neither telling you in advance nor at an intermediate stage or anywhere else necessarily what form my judgment will take. I will do exactly what I did in the Shoe Case. And if you need to find out what I did look at the record.

Mr. McInerney. I know what your Honor did in that case. And I am sure your Honor will not slavishly follow the government's draft of a proposed decree here.

The Court. I am not bargaining with you or with the government. I am not in the business of single or collective bargaining. I am a Judge, and you will learn what that means if you want to.

• • • • • •

APPENDIX B

Grinnell's Disqualification Petition and Judge Wyzanski's Memorandum of June 9, 1964.

PETITION and AFFIDAVIT—Filed June 9, 1964

R. 293 STATE OF RHODE ISLAND,
County of Providence, ss:

Clarence H. Rison, being duly sworn, deposes and says:

1. I am a Vice President of defendant Grinnell Corporation ("Grinnell") and respectfully submit this affidavit in support of Grinnell's petition that the Honorable Charles E. Wyzanski, Jr. (who was assigned to this case by Chief Judge Peter Woodbury of the United States Court of Appeals for the First Circuit in March of 1962) disqualify himself and proceed no further herein, except to request that another Judge be assigned to preside at the trial of this action. This affidavit is made on information and belief based on my examination of the transcripts of pretrial conferences and hearings held herein on December 18, 1963, May 28, 1964 and June 3, 1964, as well as related documents.

[fol. 413] 2. At the December 18, 1963 conference, plaintiff's counsel proposed a further pretrial conference in about two months' time for the purpose of obtaining rulings on admissibility of evidence in advance of trial (Tr., Dec. 18, 1963, p. 10). Counsel for defendants suggested that, prior to such rulings there should be a pretrial conference devoted to a discussion of the relief sought by the plaintiff as recommended by the "Handbook of Recommended Procedures for the Trial of Protracted Cases", adopted by the Judicial Conference of the United States in March 1960, 25 F.R.D. 351, 398 (Tr., Dec. 18, 1963, pp. 14-16). The Court replied:

Grinnell's Disqualification Petition and Judge Wyzanski's Memorandum of June 9, 1964.

> "• • • if I understand the suggestion in its full scope, it is really an invitation to the Court to participate in a discussion of relief without addressing itself to the merits." (Tr. pp. 16-17)

R. 294 Counsel for defendants answered that they would be willing to enter into such a discussion on an assumption of liability (Tr. p. 17), and the Court thereafter summarized the procedure as follows:

> "In other words, I think what is reasonable to do under the circumstances is to allow all parties to have an awareness of how far the Court would be likely to go if the facts were as strong as the government says they are." (Tr. p. 23)

3. That same day, in accordance with the Court's direction, the parties agreed on a briefing schedule and the Court entered an order containing that schedule and concluding that, at an unspecified date after April 13, 1964, a pretrial conference would be held "for the primary pur- [fol. 414] pose of discussing the relief which would be appropriate in the event plaintiff prevails". On February 14, 1964, plaintiff submitted its proposed form of judgment, which went far beyond the prayer for relief in the complaint, along with a brief stating its views as to the liability of the defendants. On April 6, 1964, the defendants submitted briefs on relief and proposed changes in plaintiff's proposed form of judgment. In doing so, defendants expressly restated their understanding of the procedure to be followed (*i.e.*, that there would be an *arguendo* assumption that plaintiff could establish a case) and implicitly demonstrated their confidence in the Court's ability to consider the relief aspects of this case without pre-judging its merits.

4. By letter dated May 4, 1964, the Court set May 28, 1964 as the date for the pretrial conference. On that date,

however, the Court expressed doubt whether there was any use in any discussion of relief, and stated it knew that the trial would not take very long (Tr. p. 7). When Grinnell's counsel stated his belief that it would help both sides if the Court would indicate its views of what relief might be appropriate, so that the parties would know what would be at stake in a trial, the following colloquy took place:

> "The Court, I assure you that you would not be helped by anything I would say. *You would do better* R. 295 *to get together with the government rather than run the risk of what I would say from what I have seen.* Let me just assure you that. And I mean every word, and you can underline that four times. [fol. 415] "Mr. McInerney. We had in addition to that purpose, your Honor, a purpose that had to do with the possibility that there might be a trial and that this procedure would not result in a consent decree and that was the narrowing of the issues or the elimination of some of the issues in this case.
>
> "The Court. The case is set for trial Monday, June 15th, the government to proceed.
>
> "Mr. McInerney. Your Honor——
>
> "The Court. There is no use in discussing it with me. I have read enough to know that if I have to decide this case on what I have seen from the government you will not be in a position at this stage to agree to it." (Tr., May 28, 1964, pp. 9-10)

5. The Court had given no prior notice of this peremptory trial date, and counsel for both sides suggested that there were further pretrial procedures to be dealt with (Tr. p. 10). The Court concluded the conference with the statement:

> "No delays, postponements or further method of avoiding the impact of this Court. The 15th of June." (Tr., May 28, 1964, p. 11)

6. As soon as possible thereafter, defendants moved for an order postponing the trial date and limiting the issues to be tried herein to those framed by the pleadings for the purpose of determining whether the relief requested in the complaint should be granted. The Court held a hearing on that motion on June 3, 1964, in the course of which it made the following statements to defendants' counsel:

> "The Court. Yes. I can't understand frankly why you don't realize that you have forced me to look at the documents in this case, which I dislike doing in advance of trial. You have invited me, therefore, R. 296 [fol. 416] into what I regard as, from your point of view, a rather undesirable situation. I think I made that clear at the beginning. I have told you that, forced by you to look, my views are more extreme than those of the government; and *I have also made you realize that if I am required to make Findings and reach Conclusions I am opening up third-party suits that will make, in view of the size of the industry, the percentage of people involved higher than in the electrical cases.* Is that clear?
>
> "Mr. McInerney. Yes, your Honor. I would like to make clear from the defendants' point of view, your Honor, that your Honor's statement seems to give some status to government demands that are far beyond what the complaint requests.
>
> "The Court. I am not going to engage in any bargaining or discussion with you. I am not going to limit anything at this stage, not a thing." (Tr., June 3, 1964, pp. 19-20, emphasis added)

7. The following day, June 4, the Court issued this order:

> "The motion of the defendants filed on June 2, 1964 is denied. The motion of the defendants to limit

the relief available to the Government is denied,—the Court itself when it makes its findings of fact and conclusions of law will frame the relief, and accepts no limitations except those appropriate to judicial action; it refuses to bargain with anyone with respect to how the Court will exercise its judicial power."

8. The foregoing record clearly indicates that the Court has already reached a firm conviction concerning the merits of this case and whether any relief should be awarded to the Government herein. The Court has stated that, if it is required to try this case, relief of some kind will be granted to plaintiff. Moreover, it has indicated that it will order relief more drastic than what is requested in the complaint, and even beyond plaintiff's more extreme proposed form of judgment herein, thus indicating the extent of the Court's conviction on the subject of liability.

R. 297 [fol. 417] 9. It may be that the Court has reached these conclusions as a result of the "relief pretrial" procedure, which would seem to have inherent in it hazards to the possibility of a fair trial unless such proceedings are conducted circumspectly and kept within the boundaries of the issues framed by the pleadings and prior proceedings. Our understanding of that procedure was that the Court would assume liability on defendants' part, but *only* for the purposes of pretrial discussions looking toward obtaining a tentative indication from the Court of the relief that would then be appropriate. Instead, it now appears that the Court has concluded that any trial of this case will result in a finding of liability.

10. This motion is made with greatest respect for this Court and the United States District Judge presiding. We

have reluctantly concluded that it is our disagreeable duty to call the Court's attention to the state of mind in which it is about to judge defendants because due process requires that the trial be conducted by a judge who can and will accord defendants the presumption of innocence to which they are entitled. We deeply regret this turn of events because we do not believe the Court's attitude on the merits of this case, as reflected in its remarks on the record, has resulted from any bias or prejudice which existed prior to the Court's accepting assignment to this case in 1962, or even prior to this year. Instead, we believe the Court's convictions have resulted inadvertently from the very pre-trial procedures defendants themselves proposed. Nevertheless, the fact remains that the Court's pre-judgment of this matter is tantamount to prejudice.

[fol. 418] Wherefore, Grinnell Corporation respectfully submits that the Honorable Charles E. Wyzanski, Jr., in order to assure defendants of a fair trial, should voluntarily disqualify himself and proceed no further with this case except to request the assignment of a new judge for purpose of trial.

Clarence H. Rison.

Sworn to before me this 9th day of June, 1964, in Providence, R. I.

Matthew W. Goring, Notary Public.

Grinnell's Disqualification Petition and Judge Wyzanski's Memorandum of June 9, 1964.

R. 298 As counsel of record for defendant Grinnell Corporation, I hereby certify that this motion and affidavit are made in good faith and in the interest of justice.

Roger T. Clapp.

Sworn to before me this 9th day of June, 1964, in Providence, R. I.

Matthew W. Goring, Notary Public.

Transcript of Hearing on Motions.

June 9, 1964

R. 299 [fol. 421] The Court: A motion having been filed, pursuant to the provisions of Title 28 of the United States Code, section 144, I take the following action. The section in question recites that whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the Judge before whom the matter is pending has a personal bias or prejudice, either against him or in favor of any adverse party, such Judge shall proceed no further therein but another Judge shall be assigned to hear such proceeding.

This is a case which was assigned to me by Chief Judge Woodbury, and is a case pending in the District of Rhode Island. The only regular Judge of that District, Judge Day, is disqualified by his own statement. Thus the matter of my disqualification must be referred back to Chief Judge Woodbury who I know will find it appropriate to take action before Monday next. If I am disqualified in the light of Judge Woodbury's opinion I shall of course not conduct the hearing on Monday next. If he concludes that for any reason whatsoever the motion is invalid I shall proceed as planned on Monday next. Application may be made to him forthwith. He is in New Hampshire.

APPENDIX C.

Excerpts from the Trial Transcript.

Hearing on Preliminary Motion.

June 15, 1964.

. . . . . .

R. 323 Mr. Story: Your Honor, shall the Government proceed?

The Court: If you are ready.

Mr. Story: First, your Honor——

Mr. Fritz: May it please the Court, before the Government proceeds may I with your Honor's permission note [fol. 459] on the record in behalf of the defendants whom I represent our objection to proceeding to trial on this day of June the 15th, 1964 upon the ground that we have not been provided with an adequate opportunity to do the final preparatory work for trial within the period which your Honor has assigned to us, namely, the period between May 28th, 1964 and this date, on the first date, being the date which your Honor advised us the case would proceed to trial on this date, and I respectfully by reference incorporate in support of my notation on this record——

. . . . . .

Mr. Fritz: I understand. I wish to incorporate in support of my statement the matters which are contained in my affidavit in which I asked the Court for two months' postponement and supporting our reasons we thought to be sufficient for an extension of time for that period. I simply want to make it plain on the record that notwithstanding that we made this formal application before your Honor on R. 324 June 3rd, and it was denied, I wish to preserve my my position on this record.

[fol. 460] The Court: I have no objection to the notation. I have a strong objection to the misrepresentation. This Court set the matter for November, 1963 and has from time to time postponed it to meet the convenience of counsel.

You may proceed.

Excerpts from Transcript of Trial.

Mr. McInerney: Your Honor, I simply wish the record to note that Grinnell joins in the statement of counsel for the defendant Alarm Companies, • • •

The Court: The notation is made. The same comment is made by me, that the case was set for November, 1963, and that was seven months ago.

• • • • • •

Transcript of Trial.

June 15, 1964.

(Entire First Day)

R. 325 [fol. 463]

Mr. Story: Shall I proceed, your Honor?

The Court: Yes.

Mr. Story: Your Honor, the Government waives an opening statement in this matter, but I would request your Honor to allow me a very short rebuttal in the event that the defendants make an opening statement.

The Court: All right. No opening will be made until the defendants begin, in accordance with the usual practice in this court.

Mr. Story: Very well, your Honor. Well, your Honor, at this time the Government would like to proceed with the introduction of its documentary evidence.

The Court: You may proceed.

Mr. Story: Your Honor, I have one suggestion, if it is agreeable to all parties here, that will save some time, your
R. 326 Honor. As your Honor knows, by order of this Court the Government filed with the Court designation of the documents that it intended to use in its case-in-chief back in February, I think it was February 1st.

Excerpts from Transcript of Trial.

In that document, the Government listed documentary material numbered from 1 to 307. Now it is my intention here this morning, your Honor, to describe only——

The Court: You need not describe them. They have already been described.

[fol. 464] Mr. Story: That is what I was going to suggest, your Honor.

The Court: You may offer them in bulk.

Mr. Story: Very well, your Honor. There is just one point that I would like to bring out to your Honor. There are some six documents where the Government introduced only a portion of the document. Now we have received objections from the defendants to the admissibility of these documents. They have not objected so far to the introduction by the Government of only a portion. But I want to point out that to your Honor, so that in the event, as to those six documents, the defendants would like to offer any other portions, this will give them that opportunity.

With that, your Honor, and to be of assistance to all of us in handling the exhibits in the record, I would suggest that the Government's memorandum be given to the Court Reporter and have him type in the record of this hearing, just as I have here, the documents which have been, incidentally, your Honor, marked for identification by your Clerk, in the same numerical order as they appear in my memorandum.

The Court: There is no reason for the Court Reporter to undertake that labor. I will receive that—has it been marked?

Mr. Story: This has not been marked.

[fol. 465] The Court: I will receive that merely as a matter for identification. It is not an exhibit. It is a classification of exhibits. It is not received as an exhibit. It is, however, to be given a number, as though it were an exhibit, but to be marked an exhibit for identification only. What is the next number?

The Clerk: 364.

Excerpts from Transcript of Trial.

The Court: It is 364 for identification only.

R. 327 (Document entitled Designation of Documents upon which Plaintiff Will Rely in its-Case-in-Chief and a statement of the main issues to which each document primarily relates, marked Exhibit 364 for Identification.)

The Court: Now you offer the 363 preceding exhibits?

Mr. Story: The Government now offers what have been marked Government Exhibits 1 through 307 for identification into evidence.

The Court: Is there any objection?

Mr. Fritz: I have two matters, your Honor.

Mr. Story: Wait a minute.

The Court: Wait a minute. I thought Mr. Story had concluded.

Mr. Fritz: I am sorry.

[fol. 466] Mr. Story: I am sorry, your Honor. I have finished.

The Court: Mr. Fritz?

Mr. Fritz: First of all, if your Honor please, I object to the receipt of these documents in bulk.

The Court: They will not be considered of course in bulk. But all have been before you, all of them have been analyzed, and it is a matter of convenience to have them presented in bulk. I will of course regard them individually.

Mr. Fritz: Yes, I understand that. I wish to make the point, however, and I want to do it at the outset, that with such a bulk presentation, we have here a claim by the Government for conspiracy between or among the four defendants, and I represent three of those defendants, and I suppose it is fundamental that no document relating to any alleged act or episode that may be referred to in any document on the part of one can possibly bind any other person until the so-called conspiracy is proved as an independent fact.

The Court: I am satisfied from my examination of the documents that a prima facie case has been made for the admissibility on the conspiracy theory.

Excerpts from Transcript of Trial.

Mr. Fritz: Well, I respectfully urge my reasons, as a preliminary objection. Secondly, as counsel for the Government has said, and as your Honor has noted, we have been furnished with a list of these documents, and we also have [fol. 467] furnished the Government with the designation of the objections that we have to those documents. There R. 328 are some of course to which we made no objection. Frankly, I am in a bit of a quandary as to what the situation is with regard and will be with regard to those objections.

The Court: I am going to rule upon them this morning or as soon thereafter as you have finished your argument.

Mr. Fritz: Well, I don't think the document I have here will fully acquaint your Honor with the detail bases for the objections.

The Court: You have my permission to speak orally as long as you like, to the Greek Calends, if you please.

Mr. Fritz: Well, I haven't any intention, if your Honor please, of arguing the objections to each of these three hundred and some odd documents individually, but I have noted to the Government the nature of our objections to those to which we do object. I have a statement here setting forth the nature of those objections in very cryptic form, however. I would be glad to hand those to the Court as part of the record in this case——

The Court: You may do so.

Mr. Fritz: —as a basis for your Honor's consideration. [fol. 468] The Court: You may do so. I have told you I am ruling as soon as you have finished. Anything you wish to say by way of elaboration you are free to say. No cloture will be imposed.

Mr. Fritz: Well, I don't think I wish to say anything further than to simply call your Honor's attention to the nature of the objections we have to the various documents listed on this exhibit.

The Court: It is received as Exhibit A for Identification on the part of the defendants, not for admission but for identification.

Excerpts from Transcript of Trial.

(Schedule of defendant Alarm Companies' Proposed Objections marked Defendants' Exhibit A for Identification.)

Mr. Story: May I proceed, your Honor?

The Court: I don't know whether somebody else wants to say something.

Mr. McInerney: If your Honor please, rather than duplicate the statements of co-counsel, I would adopt his objections insofar as they pertain to this defendant, and I would like to further note, your Honor, one other difference **R. 329** in our position, perhaps not a difference but perhaps not one brought out and emphasized by co-counsel.

Grinnell not only objects to these documents, or certain of them, but I have a list here——

[fol. 469] The Court: You may hand that up, if you wish, and it may be marked Exhibit B for Identification.

(Defendant Grinnell Objections (to Government documents) marked Defendants Exhibit B for Identification.)

Mr. McInerney: In addition to the grounds stated on that list, your Honor, your Honor has stated that a prima facie case has been made out for a conspiracy and, therefore, the documents of the alleged co-conspirators should be admissible as against all of the defendants. This defendant has had a controlling interest in the other three defendants since 1953 and we respectfully submit, your Honor, that insofar as the documents between these defendants, excluding those, but just taking the intra-corporate affairs of each defendant, even though those documents may relate to relations with the other defendants but did not pass between the defendants, that is to say any document that is not from, to or about Grinnell, since the period of its common ownership of these subsidiaries, we submit that as of that time there is no conspiracy recognizable in law with respect to the intra-corporate affairs of these people. Your Honor, I am not going to argue at great length.

Excerpts from Transcript of Trial.

Mr. Story: Your Honor——

[fol. 470] The Court: I know the Supreme Court cases. Do sit down, Mr. Story.

Mr. Story: Your Honor, I had not finished my evidentiary presentation as to——

The Court: Please sit down, Mr. Story.

Mr. McInerney: This is a very substantive point with us, your Honor.

The Court: I understand that. And it is one which, of course, you are free to try to get the Supreme Court of the United States to change its views upon.

Mr. McInerney: All I am saying, your Honor, is that I do not intend to expound on it at great length at this time. I simply wanted to note that objection, for the record, and have your Honor's ruling on it at the close of the plaintiff's case.

The Court: The 307 exhibits, Exhibits 1 through 307 for R. 330 Identification, inclusive, are admitted in toto, in accordance with the proffer. All objections are overruled.

(Documents formerly marked Government's Exhibits 1 through 307 for Identification received in evidence.)

Offer in Evidence of Additional Government Exhibits

Mr. Story: Now, your Honor, the next five exhibits which have been marked for identification are duly executed stipulations between the parties. I would like now to identify them on the record.

Government Exhibit for Identification No. 308 is stipula-

[fol. 471] tion No. 1 between the parties, which is a stipulation as to the authenticity of the documents offered into evidence by the plaintiff, that is, Government Exhibits 1 through 307.

The Court: Is there any objection? I hear none. Admitted.

(Stipulation No. 1 between the parties marked Government's Exhibit 308 and received in evidence.)

Excerpts from Transcript of Trial.

Mr. Story: The next document, which has been marked Government Exhibit 309 for Identification, is designated as Stipulation No. 2, which is a stipulation as to the volume of customers across State lines in the United States and the District of Columbia.

The Court: Mr. Story, if these are all stipulations, there is no need for you to describe them. You will just run up a bill with the Court Reporter. How many stipulations are there?

Mr. Story: There are five.

The Court: Is there any objection to any of them?

Mr. Fritz: No, sir, we have stipulated.

The Court: They are all admitted.

Mr. Fritz: I am assuming that we are talking about the same ones he is.

[fol. 472] The Court: Obviously if there is a mistake with respect to that, I will reopen the matter.

Mr. Story: Just for the record, your Honor, the stipulations have been numbered Government Exhibits 308, 309——

The Court: You are not buying this transcript but the defendants are. Why charge them for your words?

R. 331 Mr. Story: Well, your Honor, this will only take a few minutes, and I would like the record to be straight.

The Court: All right.

Mr. Story: Government's Exhibits 311 and 312.

(Stipulations Nos. 2, 3 and 4 and 5 between the parties marked Government's Exhibits 309, 310, 311 and 312, respectively, and received in evidence.)

Mr. Story: Now, your Honor, the next four exhibits which have been marked for identification are the Government's extracts of answers by the defendants to interrogatories propounded by the Government.

The Court: 313 through what?

Mr. Story: 313, 314, 315 and 316.

The Court: Is there any objection? I hear none. Ad- [fol. 473] mitted.

Excerpts from Transcript of Trial.

(Designation of Answers of ADT, Holmes Electric Protective Co., Automatic Fire Alarm Co. of Delaware and Grinnell Corporation to Interrogatories propounded by Plaintiff, marked Government's Exhibits 313, 314, 315 and 316, respectively, and received in evidence.)

Mr. Story: Now, your Honor, the next exhibits which have been marked by your Clerk for Identification are excerpts from the transcripts of depositions taken in this matter.

The Court. What are their numbers please? Beginning with 317?

Mr. Story: 317 through 363.

The Court: These are all extracts from depositions?

Mr. Story: Yes, your Honor.

The Court: And you are offering them in toto. And there is no objection to them, I assume?

Mr. Story: No, your Honor, there is not.

The Court: No objection?

Mr. Fritz: Well——

Mr. Story: I——

The Court: Just a moment. There appears to be an objection by Mr. Fritz.

[fol. 474] Mr. Story: Well, your Honor, I am not offering all of them into evidence.

The Court: What are you doing?

R. 332 Mr. Story: Some of the extracts, your Honor, I am not offering into evidence.

The Court: Which ones did you have marked you do not intend to offer?

Mr. Story: I can state those in the record right quickly.

The Court: I hope so.

Mr. Story: Government Exhibit 321, which is a deposition of Benjamin H. Call of the Call Police Signal Corporation, Chelsea, Massachusetts. The Government does not plan to offer into evidence this deposition because we found in the late stages that it would be cumulative.

Excerpts from Transcript of Trial.

The Court: I am not ruling on matters not offered. Just give me the numbers of the ones you are not offering.

Mr. Story: I am not offering Government Exhibit for Identification 321, 322——

Mr. Fritz: Excuse me. What was that number?

The Court: 321 and 322.

Mr. Story: Yes, sir.

Mr. Fritz: Could you give us the name please?

The Court: Yes, do that. The first one was Call.

[fol. 475] Mr. Story: All right.

The Court: The second one?

Mr. Story: Exhibit 322 for Identification is a deposition of Henry G. Clark, Providence, Rhode Island.

Mr. Fritz: Who is 321?

The Court: Call.

Mr. Fritz: Thank you.

Mr. Story: Government Exhibit 327 is the deposition of Joe Forman of the Call Police Signal Corporation, Chelsea, Massachusetts.

Government Exhibition for Identification 332 is the deposition of Francois Guibert, District Telegraph Company, Newark, New Jersey.

Government Exhibit for Identification 344 is the deposition of Ralph C. Peabody, Granite State Alarm Company, Manchester, New Hampshire.

Government Exhibit for Identification 350 are excerpts from the deposition of Herman E. Robinson, Protective Alarm Company, Philadelphia, Pennsylvania.

Government Exhibit for Identification 353 is the deposition of Freddie Schnell, Electro-Protective Corporation, Newark, New Jersey.

R. 333 Government Exhibit for Identification 354, extracts of the deposition of Jack Silverman, National Protective Corporation, Baltimore, Maryland.

[fol. 476] The Government is not offering the exhibits I have just related.

The Court: The Government's offer is of Exhibits 317 through 320, 323 through 326, 328 through 331, 333 through

343, 345 through 349, 351, 352, 355 through 363. Is there any objection?

Mr. Fritz: Well, there are two others I would like to make inquiry about because I think they fall in the same category of reasons for which the others have been excluded. I may be in error.

The deposition of Mr. Rosenberg of the Hyde Park Alarm, which is within 100 miles of this court, may I ask the Government whether that deposition is to be offered or not?

Mr. Story: The Government—Mr. Who, sir?

Mr. Fritz: Mr. Rosenberg, Hyde Park Alarm, in this area.

Mr. Story: The Government has not designated any portion of that deposition and at the moment we do not intend to offer any of it.

Mr. Fritz: Very well. May I also inquire whether or not the deposition of Harold S. Leich, Milwaukee, Wisconsin, is intended to be offered by the Government?

Mr. Story: It was offered, your Honor, and I intended to offer it.

[fol. 477] The Court: The number please?

Mr. Story: Your Honor, that is Exhibit 355—335, rather.

The Court: 355.

Mr. Story: Well, your Honor——

The Court: Hold on for a moment. I don't want anything on the record or off the record until I have read this communication which has just been handed to me.

I have just been handed a communication, received this morning in the office of the Clerk, from Harold S. Leich, who, I assume, is the person to whom reference has just been made in the preceding colloquy. This addressed to Neale D. Murphy, Clerk. It is addressed to the United States District Court, United States Court House and Post Office Building, Boston, Mass.

R. 334 It reads as follows:

> "Dear Mr. Murphy" and it is signed "Harold S. Leich."
>
> "Would you please hand the Judge the enclosed letter. The enclosed subpoena was not served on me until 7:30 A.M. June 13, 1964.
>
> "I also contacted at 12:42 A.M. June 14, 1964 Mr. Ralph Schulke of the local A.D.T. office so that he could inform their attorneys."

[fol. 478] And the enclosed letter is from a Dr. Francis F. Rosenbaum, 425 East Wisconsin Avenue, Milwaukee, Wisconsin. It is dated June 13, 1963. It is addressed to this Court and says:

> "This is to certify that I have attended Mr. Harold S. Leich of 8860 No. Tenneyson Dr., Milwaukee, Wis., 53217, since November 1960. Mr. Leich has extensive coronary artery disease.
>
> "I have been informed that Mr. Leich has been asked to appear at a trial in Boston on the morning of June 15, 1964. It is my opinion that Mr. Leich should not appear at a trial without adequate medical preparation and that the time allotted since his notification is not sufficient to permit this."

Mr. Duffey, in copying this in the record, there are a number of typographical errors. It is to be copied exactly as it is, please.

In view of this plausible, at any rate, excuse do you want to persist with the offer of exhibit 355 for Identification?

Mr. Story: Yes, your Honor.

The Court: All right. I just did not know whether in view of the fact it is quite obvious we may have to have a postponement, if you introduce 355 for identification, [fol. 479] you want, yourself, to invite that postponement.

Mr. Story: In just a moment——

The Court: That is all I am asking you. Nothing more. Think about it.

Mr. Story; Your Honor, the Government will withdraw its offer.

The Court: All right. That is enough. You don't have to tell me why.

Mr. Story: I want to straighten the number out, your R. 335 Honor. I called it 355. It should be 335. I would like to get that straightened out on the record.

The Court: All right.

Mr. Story: The Government will withdraw its offer of this deposition into evidence.

The Court: All right. It is withdrawn. That makes it 333, 334 and 336 through 343.

Mr. Fritz: Mr. Story, have you finished with your offer?

Mr. Story: Yes.

COLLOQUY BETWEEN COURT AND COUNSEL FOR DEFENDANTS

Mr. Fritz: If your Honor please, some time back——

The Court: Excuse me. Before you do proceed, would Mr. Story or somebody on the United States Government's side inform Mr. Leich that the subpoena—no, I guess the defendants issued the subpoena.

[fol. 480] Mr. Fritz: That is correct, yes, sir.

The Court: Will the defendants inform him that the subpoena is withdrawn?

Mr. Fritz: Yes.

The Court: With the consent of the Court it is quashed. Now you may proceed.

Mr. Fritz: As your Honor will note, and probably has not had an opportunity to note, counsel for the Government and ourselves have cooperated to have printed almost as a running text the excerpts from all of these depositions that have been offered.

The Court: You would be surprised at how much I have noted, although in your arguments you have sometimes assumed that I do not note what is filed.

Mr. Fritz: I really would not assume that, sir. It is just bulk that I thought——

The Court: You had better make no assumptions as to the rate or quantity of work that I have done.

Mr. Fritz: I hope your Honor will take my statement that I meant not the slightest offense or reflection.

The Court: I do regard your statements as both an offense and a reflection at an earlier stage because they are based upon the assumption that I gained information from some other source or other circumstances than by [fol. 481] your demand that I should read these documents.

Mr. Fritz: May I——

R. 336 The Court: You yourselves put on me the burden of forming an opinion and I did form one.

Mr. Fritz: May I respectfully say that I had no such intention in any comment I made to this Court.

The Court: You have sometimes given the Court the impression that I acquired some idea of this case except from you and opposing counsel. I have no other idea.

Mr. Fritz: I have purposely never intended to convey the slightest intimation of that to your Honor nor has it been in my mind at any time, and if I did so it was certainly an inadvertence, which I regret very much.

The Court: You have made it quite plain to the country at large, or at least to this community, that you regarded me as having formed an opinion from some other way than a Judge ought to form an opinion.

Mr. Fritz: Well, I don't think it becomes me to make any comment except to say that what I submitted to this Court I did on the basis of only two matters, two excerpts of hearings before this Court, one, May the 28th and one, June the 3rd, and they were presented in full.

The Court: They did not tell the whole story because over my strong reluctance you insisted that I should hold [fol. 482] a case in suspense so that you could confer about a possible settlement and that I could look at the papers with respect to the matter. You, not I, created the

difficulty. Any Judge would properly resent being drawn into a situation as a trap and then have the door let loose.

Mr. Fritz: Well, I don't think it would serve any useful purpose on my part certainly—your Honor seems to have strong convictions about that—but let me just close it by saying that for my part, and I am sure for Mr. McInerney's part, we came here suggesting the use of the Handbook Procedure in the utmost of good faith thinking it would be of help. Now we may have been mistaken in that but that was what our motivation was.

The Court: You proceeded to disqualify two Judges and sought to disqualify the third on the eve of a trial that had been postponed for nine months.

Mr. Fritz: The disqualification of the two prior Judges was purely voluntary on their part and had nothing to do with any of us.

Now with respect to the depositions that have been offered by the Government may I point out, as I was say-
R. 337 ing to your Honor, and I perhaps used an unfortunate phrase, that we collaborated to put together the excerpts from the depositions so that they would present a running [fol. 483] story with respect to each of the depositions.

However, both we and the Government have noted objections to certain portions of the depositions that each has selected. The pages of those objections are not reflected in the deposition excerpts as filed, and so we have pending at the moment objections to certain portions of these depositions which I wish to submit to your Honor for consideration in such fashion and at such time as your Honor might want them.

The Court: Right now.

Mr. Fritz: Well, sir, the exhibit, as I have it prepared, sir, includes the depositions that were withdrawn this morning. I had no way of knowing that they were not going to be pressed. So may I have just a few minutes to rearrange this document?

The Court: Surely. Do you want a recess for a few minutes?

Mr. Fritz: I think so, sir.

The Court: All right. We will take a 10 minutes' recess.

(Recess.)

The Court: Mr. Fritz, you may proceed.

Mr. Fritz: I am not ready, but may I make this suggestion, so we do not waste time. We have not been able mechanically to do what I had hoped we could do in this [fol. 484] short period of time. May I offer——

The Court: You may have as long a recess as you want.

Mr. Fritz: Well, if that is so, then I would appreciate putting this in an orderly fashion. It may take another ten minutes or so.

The Court: You may have certainly ten minutes.

Mr. Fritz: Thank you, sir.

The Court: When you are ready, let the Court Officer know.

Mr. Fritz: I beg your pardon, your Honor?

The Court: When you are ready, let the Court Officer know.

Mr. Fritz: Thank you very much.

(Recess.)

R. 338 [fol. 485] Mr. Fritz: If the Court please, I offer to the Clerk to be marked by the Reporter five sections of documents containing the defendants' objections to the depositions which have been offered by the Government this morning, and these sections are all tied in by reference to the Government Exhibit numbers on those depositions.

I apologize for the appearance, but it results from the removal of the sheets relating to those depositions which the Government has withdrawn.

The Court: Do you want to be heard orally in addition to your written presentation?

Mr. Fritz: Well, frankly, I think it would be a very time-consuming problem.

The Court: All right, then don't. If you will just hand them to me I will have marked as Exhibit C for Identification those documents, of which there are five. They will be C-1 through C-5 for Identification.

Will you mark them and hand them to me, please?

Mr. McInerney: If your Honor please, on behalf of the Grinnel Corporation, rather than duplicating the objections of co-counsel, with your Honor's permission I would like to adopt them, and if we may follow that procedure throughout this trial I think it will save time.

[fol. 486] The Court: Yes. It will be understood that unless someone states otherwise, every objection throughout this trial made by any counsel for any defendants applies to all the defendants, not only to the particular defendant on whose behalf counsel is objecting. That is a universal ruling to be applied throughout this case.

Mr. McInerney: Thank you, your Honor.

If I may call your Honor's attention to just one of these exhibits, which is Exhibit 351, Government's Deposition of James E. Rose taken in Detroit September 26, 1962, we don't intend to argue the objections orally to your Honor, but I would like to call the Court's attention to the type of testimony that is being submitted.

Mr. Rose testified to an instance of alleged misconduct on the part of a Grinnell employee, and I won't go into that. I will just give in very brief form from one sentence the nature of the witness' knowledge with respect to that incident.

This is Mr. Rose testifying, page 95, second line:

> R. 339 "My superintendent, Mr. Gilbert, passed the remark to me that our installer on the job, Ted Huffer, had passed a remark to him that during the installation of us installing our devices, our switch on the O.S. & Y. [fol. 487] valves, that the Grinnell representative told our man——"

And then there was an objection, and properly so, I might say, your Honor. This is quadruple hearsay.

That paragraph gives the sum and substance of the nature of this witness' knowledge with respect to anything concerning the Grinnell Corporation, and our objection to that testimony on the ground of hearsay runs to all of the testimony with respect to the Grinnell Corporation on page 93, line 24, through page 98, line 18, Exhibit 351.

Now I won't argue the other objection, but I just wanted to call the Court's attention to that one. Thank you, your Honor.

Mr. Fritz: May I just add I don't wish to make oral argument, but what Mr. McInerney has just read to your Honor is perhaps extreme but there is a great deal of that in all of these depositions, and our objections are based on that as well as on other bases.

RULING OF THE COURT

The Court: I should like to make it quite clear that I have no intention whatsoever of resting my findings, conclusions, or judgment upon the type of hearsay illustrated just now by Mr. McInerney.

As I have already abundantly made clear in an earlier case, United States v. the United Shoe Machinery Corporation, I do not regard the hearsay rule in its full vigor [fol. 488] as entirely applicable to antitrust matters, and in that respect subsequent decisions in the Supreme Court of the United States indicate I made no error in that attitude.

I would not for a moment in any manner take into account four-stage hearsay or anything like that. These questions of hearsay are always difficult problems. The hearsay rule is not, as some people erroneously suppose, a rule adopted only for jury cases. It does apply to cases in which a Judge sits alone.

Excerpts from Transcript of Trial.

R. 340 However, the original purpose of the hearsay rule was to preserve the advantages of effective cross-examination. See Edmund M. Morgan passim.

In antitrust cases central adjudication ought not to be made on the basis of hearsay. However, certain background matters and certain minor questions may to some extent rely upon minor hearsay elements.

With respect to questions of relevance and materiality, needless to say, an objection is always valid. To determine whether a particular matter is or is not relevant or material requires a total view of all the evidence. It is generally undesirable save in the plainest case immediately to rule when a Judge sits alone upon questions of relevancy and materiality.

When he comes to draft his findings, conclusions, and [fol. 489] judgment, he is in a much better position to take a total view of the total picture and to see whether something which initially appears to be irrelevant or immaterial is in fact irrelevant or immaterial.

To be sure, the making of such determination has some disavantages for the defendants in that they cannot know whether something will or will not be excluded.

That kind of risk, however, is relatively minor because they, like the Judge, will have a better understanding of whether something is irrelevant or immaterial when they too look at the total case.

In any event, so far as I am concerned, I am not now going to exclude anything on the ground that it is irrelevant or immaterial, nor am I going to exclude anything on the ground that it is hearsay.

The protection which the defendants will have is that they may be sure that on any vital matter in the case I shall not put in a mere summary method my findings, conclusions, or judgment but, where appropriate or necessary, I shall key to particular documents or other exhibits or pages of the transcripts such support as there may be for such findings, conclusions, or judgment as I enter.

Excerpts from Transcript of Trial.

With regard to the objections made on the ground of lack of authority, it is sufficient to say that although a statement which actually lacks authority is inadmissible, the question [fol. 490] of its admissibility appears often in an inadequate setting if looked at alone. It requires a view of the **R. 341** total situation, and the Judge can best make his determination when the total picture is before him.

With regard to the objections made on the ground of lack serving, not much can be gained by either including or excluding such testimony at this stage.

If the matter is in fact self-serving, it goes to its weight quite as much as to its admissibility, and an experienced Judge, having sat for 22 years, generally knows how much attention to pay to self-serving, biased, or otherwise improperly motivated testimony.

The same may be said with respect to objections on the ground of lack of authority. Objections to the form of the question are rarely of durable significance.

To be sure, if a question is put in the presence of a Judge and an objection is made to the form of the question, a Judge will usually determine whether or not it is worthwhile to intervene.

Where the objection is merely to the form of the question put in the presence of a Notary Public or some other surrogate for the Judge and the question has been put, the objection to the form of the question is usually of no such significance as to require a Judge reviewing the deposition to exclude the question and answer.

[fol. 491] Where the answer is not responsive to the question and objection is made on that ground, the whole problem is whether or not the answer is so plainly outside the bounds of the issues of the case and the nature of the interrogation that the answer ought to be disregarded.

Here again, a Judge faced with the total record and engaged in the task of drafting findings, conclusions, and a judgment, will no doubt be sufficiently sensitive to make a

sensible disposition of the objection but a sensible disposition is better made at a terminal point in the case. [fol. 492] Where the objection is on the ground that the witness has made a conclusion or that he has indulged in speculation, this objection, of course, is to be borne in mind by the judge at the end of the case. It need not result in a fly-specking immediate examination in open court or by written opinion at an intermediate stage.

Where statements have been volunteered, the principle is identical with that where the statement is nonresponsive or allegedly nonresponsive to a question.

Where objection has been made on the ground of best R. 342 evidence or some identical principle or analagous rule, the evidence is, of course, not barred on that ground but ordinarily is not received when better evidence is readily procurable.

No doubt the objection with respect to the best evidence rule is a thoroughly appropriate objection. In a trial where the testimony is offered in open court a judge often can, by a ruling from the bench, adequately deal with the matter.

Where the testimony allegedly violating the best evidence rule is also offered before a notary public, the question as to whether it so clearly is an inferior and undesirable type of evidence is exactly like the question whether hearsay evidence ought to be received.

Indeed, the so-called best evidence rule is not as much of a bar as the hearsay rule. It is no reason for a judge at a [fol. 493] stage intermediate in the trial to make a ruling unless it is so clearly a central point that the plaintiff or offering party might run such a grave risk that the best evidence rule will be applied against the offering party without any adequate opportunity on the part of the offering party to be apprised of the fact and given the opportunity to present other better evidence available or procurable by the offering party.

Excerpts from Transcript of Trial.

Parole evidence objections run not to questions of evidence per se but to questions of substantive law. If particular items constitute a violation of the parole evidence rule, no judge adequately informed will rest his findings, conclusions or judgment upon an item which by substantive law is properly excluded from his consideration.

Where the witness is alleged not to be competent, the problem is, of course, a vital one, but competence, again, like authority is something which requires a total conspectus.

Where conversations are objected to on the ground that they were with a third party and were not binding on the defendant, the question in a sense is first whether the third party, even though not named as a defendant, is indeed a non-named co-conspirator and whether there is independent evidence of that conspiracy.

[fol. 494] Where such independent evidence exists the third-party, though not named as a conspirator, is one who **R. 343** under general principles of law has a matter of sound judicial discretion a right to be treated as impliedly authorized to make on behalf of his co-conspirators with regard to a pending conspiracy in connection with a subject of the conspiracy a declaration binding upon his fellow-conspirators.

Here again a sensible judge awaits a full picture before he determines whether or not a particular individual third-party was indeed a co-conspirator whether the conspiracy was at that time in effect and whether the matter related to the conspiracy. Were the matter being tried before a jury it would of course be necessary immediately to rule for the jury cannot be trusted with such testimony. The judge, however, must learn of the facts or the alleged facts at the very time he makes the ruling. No more prejudice inheres in his postponing the matter than in his determining at once inasmuch as the very assumption of the total proceeding is that the judge who is to find the facts make the con-

clusions, write the judgment, is the very judge who must make the ruling.

Where particular items of discovery allegedly antedate or predate the discovery period allowed by the Court, of [fol. 495] course such matters are not properly taken into account unless admissible under some other basis. This kind of objection, however, obviously relates to a relatively trivial aspect of the case, and it is unthinkable that this judge, at any rate, is going to make any findings, conclusions or judgment exclusively based upon something which predated the matters alleged in the complaint as it may be finally amended.

Where an objection has been made to a hypothetical question and the form of the hypothesis transcends the previous or subsequent testimony which would justify the hypothesis, needless to say the answer is not a properly considered item of evidence.

Whether a particular hypothesis is justified by the testimony theretofore or thereafter admitted is a complicated question requiring extensive reading of the record. A full reading of the record will take place at a later date. Interruptions at this stage need the analyses of dozens of pages of transcript. In order to decide whether a particular ques-
R. 344 tion is or is not a proper hypothetical question is a plain waste of everybody's time.

Where the objection is that the witness has no records with him, the objection may or may not be valid, depending entirely on the so-called best evidence rule which, as already pointed out, is a matter of discretion rather than [fol. 496] iron inflexibility.

Objections on the ground of leading questions are always trivial and never in my opinion have resulted in a reversal error.

Of course, if the question is a leading question, the weight to be given to the answer goes to the sound discretion of a well-informed judge.

Excerpts from Transcript of Trial.

An objection on the ground that the answer is opinion or opinion and conclusion is not an objection which must inevitably prevail. Opinion evidence of course always should be scrutinized with care. The admissibility of an opinion is addressed to the sound discretion of the judge. As Wigmore and other authorities have often pointed out, opinion evidence is a guide line which does not constitute a barrier.

Suggestive questions, like leading questions, are certainly not desirable. Sustaining the objections to them during the course of a viva voce examination in open court, particularly in the presence of the jury, may become such, but, once testimony has been taken in a deposition and the sole ground is that the question put is leading or suggestive, the point is a relatively minor and not reversible matter.

The objection that a conclusion has been made without proper foundation is a question as to whether the conclu- [fol. 497] sion really is persuasive. The trier of fact is indeed not likely to give much weight to a conclusion which he sees is without any buttress and support.

To exclude the answer merely because it is a conclusion is to confuse admissibility with reliability, particularly in a case where there is no jury.

Having read all the grounds of objections set forth in Exhibits C for Identification—1 through 5, I am satisfied that all of these points are worth considering at a time that I am required to actually draft the findings, conclusions and judgment.

I shall no doubt benefit particularly from those aspects **R. 345** of the objections which go to the weight of the testimony. I am not doubtful as to the general admissibility of the depositions as a whole. They are offered for particular points which it would take me a year to determine with a fine tooth comb, but I have no intention of engaging in a fine tooth comb process except where I finally decide that an item has such potential relevance and admissibility as by some chance being likely to influence me.

If it is likely to influence me, I shall most certainly consider with great seriousness each of the detailed objections already listed.

The objections as they are presented are overruled. The [fol. 498] rights of all the defendants are preserved. All of the exhibits offered by the Government are now admitted.

THE GOVERNMENT RESTS.

Mr. Story: Your Honor, the Government rests.

COLLOQUY BETWEEN COURT AND COUNSEL FOR DEFENDANTS.

The Court: The defendants may proceed.

Mr. McInerney: I just wanted to note, your Honor, that although Grinnell is first mentioned in the caption here, as a matter of convenience of counsel and witnesses, defendants' counsel had arranged among themselves to have the other defendants proceed first.

The Court: That is satisfactory with me.

Mr. McInerney: Thank you, your Honor.

Mr. Fritz: Before I address myself to that, may I say that my understanding of what your Honor has just said and my understanding prior to that time lead me to the conclusion at this time at the end of the plaintiff's case we need do nothing but simply reserve our right to make such appropriate motions as may be necessary at the end of the whole case.

The Court: That is up to you.

Mr. Fritz: Well, if your Honor will allow me to reserve that position——

The Court: I will allow you to reserve nothing. You may do what you want at the appropriate time.

Mr. Fritz: Well, at this time, not knowing what is in the case——

[fol. 499] The Court: Excuse me,— "not knowing what R. 346 is in the case"? You have been in possession of these documents for how long, Mr. Fritz?

Mr. Fritz: A considerable period.

The Court: How long?

Mr. Fritz: I can't answer that.

The Court: Six months at least?

Mr. Fritz: I would say so.

The Court: Thank you. I don't want any misrepresentation in any later court. I do not want it ever said that I did not give you adequate time to examine the testimony.

Mr. Fritz: I didn't say that, your Honor.

The Court: All right. I don't want any representations, because some representations made have given the impression—which is certainly not fair to this Court.

Mr. Fritz: Well, I think your Honor is stating again what your Honor said earlier, and may I simply say again and with the utmost respect that nothing was said or done by me that was intended in any way to do anything else except to protect the interest of my defendants, and that's the only interest I have ever had, sir.

The Court: Mr. Fritz, all that you have done is to say that a Judge who has evidence that came into the Court [fol. 500] necessarily was required to form an opinion, did form it to the extent necessary to make rulings, and on that basis you chose to file an affidavit of disqualification, the character of which may be the character of you but not of me.

Mr. Fritz: I respectfully except to your Honor's comments. I think my character is not in question in this case.

At this time I move to dismiss the complaint of the Government on the ground that it has failed to prove the cause of action purportedly pleaded therein or any other cause of action against my clients.

The Court: Denied.

Mr. Fritz: Exception.

Mr. McInerney: I would like for the record to make a similar motion on behalf of Grinnell Corporation, your Honor.

The Court: Denied. Excuse me——I thought you were through.

Excerpts from Transcript of Trial.

Mr. McInerney: I just want to clarify one thing. As I understand your Honor's rulings with respect to the evidence offered by the Government, they are now admitted R. 347 subject to a motion to strike at the end of the defendants' case?

The Court: At any time you may make a motion to [fol. 501] strike. I can't by any ruling now prevent you making a later motion. I have only ruled that at the moment the documents are in evidence.

Of course, in any trial at any stage event X may require a reconsideration of event A if the Judge ruled at the time that A was before him and not when X was before him.

Mr. McInerney: But as of the moment everything that has been offered by the Government has been found by the Court to be evidentiary and to be probative and to be worthy of admission in evidence.

The Court: Correct. You are right.

Mr. McInerney: If your Honor please, I have made my pro forma motion which is that the Government has not made out a prima facie case upon which relief can be granted against this defendant.

Thank you.

The Court: The motion is denied.

Mr. Fritz: If your Honor please, while it is true that I agreed with Mr. McInerney that he need not proceed first and that I would undertake that burden; and while it is likewise true that Mr. Story told me he would be finished with this case by one o'clock or at the end of the half-day session, frankly I'm not ready to proceed at this moment. [fols. 502-535] The Court: 1:30?

Mr. Fritz: Well, no, sir, I was going to ask your Honor, in view of arrangements that I have to make with certain people to be here, that I have a continuance until tomorrow morning.

I had expected, frankly, that we would be spending a little more time on the objections, but I think the matter came up I felt it was desirable perhaps to put the thing in

the form I did, and that took away a great deal of my time that I might otherwise have spent.

The Court: May I say to you I will grant you your request, but may I also say to you I do not know at what rate of speed you are capable of proceeding but I think by now you must realize the rate of speed at which I do proceed.

Mr. Fritz: I have some notion.

R. 348 The Court: You should not count on dealing with a tortoise.

Mr. Fritz: I don't count on that at all, sir. All I count on is enough time to do what is right for my clients, and I expect your Honor will grant me that.

The Court: I will grant you until ten o'clock tomorrow morning.

Mr. Fritz: Thank you, sir.

(Recessed until Tuesday, June 16, 1964 at 10 o'clock a.m.)

* * * * * *

June 16, 1964

(Second Day)

* * * * * *

R. 370 Q. But tell me this: In the areas in which you [FRANCOIS GUIBERT, Officer of Newark District Telegraph Company, ADT Competitor] do sell local burglar alarms, do you sell them to the same type of institutions or business establishments from time to time, as those to whom you sell central protection services? A. Yes.

Q. And are there similar risks involved? A. Yes.

Q. And similar in respect to size and nature of protection problems? A. Yes.

[fol. 575] The Court: I might just help you by saying that while I am no economist, I think quantitatively.

Excerpts from Transcript of Trial.

Mr. Fritz: Well, I understand that, and of course I have quantities in mind which I expect to supply to your Honor as we proceed.

The Court: I am not going to interfere with your method of presentation of the case. I might say to you, however, R. 371 that in general I am not sympathetic with these broad sketches of background which ordinarily involve a kind of material that does not require extensive question and answer method in an old-fashioned trial system,—what we are dealing with in the antitrust laws which is something which, to my judgment, is quite different from an ordinary trial and is quite different even from what the Prettiman report assumes it to be.

To a large extent the primary facts, at least, where there is no charge of corruption or malice or evil intent, can hardly be much in dispute, and the primary facts, adequately analyzed by the parties through pretrial depositions and the like, ought on the whole, except where there is some suggestion of wicked subjective intent or actual misconduct, to be within the framework of substantial agreement.

With respect to the secondary facts, sometimes referred [fol. 576] to as inferences or economic opinions or the like, there is room for a wide measure of disagreement and economists or their equivalent, competitors who are practical economists, are of some use, and there what really counts is the skill of the cross-examiner, not the skill of the direct examiner, in pointing out the fallacious quality of certain of the economic arguments impliedly or expressly contained in the testimony of the practical or the theoretical economist.

Either the defendants' counsel as cross-examiners or the Government's counsel as cross-examiners, can show up in the way that Justice Brandeis used to show up or would have shown up what is really lurking in the testimony as to secondary facts, as to economic opinion, and the like.

The third level beyond the primary facts and the secondary facts, are the legal rules. Inasmuch as we no longer live under the dispension of Chief Justice White and the Stand-

ard Oil and American Tobacco rule of reason is a thing of purely historical interest, we are faced with an attitude of predicting how far out nine movable men moving to the left will move.

That's all I am going to say.

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Q. R. 373 A. My [Guibert's] opinion is that to maintain the integrity of a service such as the one we render, which at best is one that is either forced on the buyer by law or by his conscience, it requires that all the components be very carefully selected, maintained, and serviced.

The Court: Like shoe machinery.

The Witness: Pardon me?

The Court: Like shoe machinery.

The Witness: I don't know anything about shoe machinery, your Honor.

Q. Well, let's assume that shoe machinery is used for the making of shoes. Would you assume that that is the same thing as the rendition of service to protect life and property? A. No, sir, I would not.

The Court: But the shoe machinery people said it was the same as the telephone system and the fire alarm system when they were before me, so they saw the analogy although the witness doesn't.

The Witness: I would say this much. Maybe I'm an idealist. I don't know. But I know full well that when we have [fol. 580] caught an alarm, a fire alarm, an incipient disaster, and I go in the office in the morning and I have this report that the Fire Department was there in two or three minutes with very small damage, and I go and see the owners of the plant and the people are working at their benches, and so forth, there is a very great sense of personal satisfaction in the fact that these people are working because I did a good job.

And I think the same applies if a warehouse has not been emptied of the raw materials that go into the production of

other stuff so that if a burglar drove up a truck and took it away, those people would be be out of work that morning. I don't think I am in the shoe machinery business at all.

R. 374 The Court: No, but somewhat like the telephone company.

The Witness: Well, the telephone company, if I may, your Honor—our services are produced by devices, automatic devices. Telephones are actuated by human beings.

The Court: That is only partially true.

The Witness: I think——

The Court: My understanding is that that is only par-

[fol. 581] tially true.

The Witness: I think the initial one has to be human.

The Court: Well, in each case the initial impulse is nonmechanical.

The Witness: In the telephone——

The Court: In any enterprise the initial enterprise or impulse is nonmechanical. Machines do not run of themselves, either yours or anybody else's.

The Witness: Right. The impulse that makes a man put the system in, I agree with your Honor, is certainly nonmechanical.

The Court: And he merely prepares it for a physical reaction other than a finger.

The Witness: Yes, sir.

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[Guibert] So that we find that if you can make the full decision concerning the integrity of a system, you can maintain that integrity. If you can't make that full decision, then you have this divided responsibility, divided willingness to pay or to acquire, and it doesn't work out, especially where we don't produce goods that can be stored on a shelf for inventory or that kind of thing.

R. 375 The Court: Don't you think that that argument carried to its extreme is plainly contrary to the kind of decision under the antitrust law which had segregated, for example, the manufacture from the servicing of Pullman cars?

The Witness: I am not up on the law, your Honor.

The Court: All that I am trying to point out is this: From the witness box you are making an argument of an economic character which has been specifically rejected by the Su [fol. 583] preme Court of the United States and the lower courts, and while no one wishes in any way to curtail your freedom of economic view, the extent to which your testimony is apt to persuade this trier of fact is somewhat limited in the light of the restrictions imposed upon him by precedents more recent than Chief Justice White.

Q. Mr. Guibert, is it your opinion that the service of the burglar protective type and the fire type which has as its object the preservation of life and property can be as adequately provided if the subscriber owned the equipment as it is now on rentention by the central station companies? A. No.

The Court: I haven't any objection to your going ahead, Mr. Fritz, and putting arguments through a witness' testimony on this kind of matter. If you think this is the way most effectively to call it to the attention not only of this court but of higher courts, I am going to allow you to do it.

I am not going to stop you for one moment. You may have as much rope as you wish. I, however, may well advise you that in my view what this witness is testifying to is not a set [fol. 584] of facts; it is a set of economic views which may be orthodox or heretical and as to which I would be able myself to make a convenient and quicker grasp from briefs as I ever would from the witness box.

You are free to do it as you like. If you think another group of judges, especially those higher in position than myself, would react differently, that's up to you. I can tell you I sat through almost as many antitrust cases as you have yourself.

Mr. Fritz: I think your Honor has had more——

The Court: And I know the difference between that which extends the record and that which sharpens it.

Mr. Fritz: I make only one observation about that. In so
R. 376 far as I know, there is no case touching this case of title or its effect involving the rendition of service such as we have here and I have called this witness because I think because of his background and experience not only in his own business but in consultation with others throughout the country for a great many years, he has an opinion which is worthy of deep consideration on the question as to whether or not adequate service can be rendered in circumstances other than they exist at this time.

[fol. 585] The Court: Mr. Fritz, I am not going to prevent you from offering it. I am merely telling you that so far as I am concerned I know very well where I come out on this believing myself to be bound.

Now, you, of course, are free to build the record hoping that some other more enlightened judge will have a more sympathetic view. I am not saying that in any other sense than telling you that I know where I come out not because I have, as has been suggested, a bias except that kind of bias which emanates from prior experience in this field, the kind of bias which constitutes judgment.

Mr. Fritz: And because your Honor is enlightened I was simply trying to make the distinction that this is a case involving a vital service, and I know of no case which has treated of this subject before.

The Court: All I can say is that it is a fact which is present and which I can understand. It takes one line of testimony and doesn't take one volume. It is different. Is it a difference which is important? Is it in lawyers' language a distinction without a difference?

Mr. Fritz: My answer to that would be that it is a very serious difference.

[fol. 586] The Court: And my answer is that I think I understand five of the nine well enough to believe otherwise.

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Excerpts from Transcript of Trial.

R. 377 Q. Then you [*i.e.*, Guibert] are suggesting that there should be trained personnel familiar with the intricacies of the equipment itself, is that right? A. Yes.

Q. And does that equipment play a coordinated part in the whole unit of the protection services? A. Yes.

Q. And by that I mean it is coordinated with the central station equipment, is it not? A. Yes. And also with the equipment at the premises.

Q. And they are manufactured to operate as a unit? A. Yes.

The Court: Mr. Fritz, what do you gain by these leading questions and answers over an extended statement of ten pages in your brief about the great merits of this system? Do you think you will persuade me one bit more by this kind [fol. 589] of testimony? Maybe you will persuade somebody else. And if you think so, all right. I just assure you it is a great ceremonial act, as far as I am concerned.

Mr. Fritz: Well, may I just point this out. The brief to R. 378 which your Honor refers, I assume, was the one we submitted on the 6th of April. If the Supreme Court, or to whatever court this case may go, if it ever goes anywhere, is going to have that brief before it, then I think our views are pretty well set forth.

The Court: I admit the brief in evidence forthwith as an exhibit. What is the letter?

The Clerk: D.

The Court: D.

(Brief filed by Mr. Fritz marked Defendants' Exhibit D and received in evidence.)

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The Court: I would think that it is about time counsel learned that arguments from the witness box, as Learned [fol. 590] Hand said, are generally in the hands of less competent people than arguments from counsel at the counsel table. And a judge of any consequence whatsoever listens at least as attentively to counsel who argues opinion of that

character as he listens to witnesses who go through the form and ceremony of question and answer.

Mr. Fritz: I am offering the opinion of this man, who I think is an expert in the field, and I felt this Court would be aided by hearing what he has to say because what he has to say is based upon almost a lifetime of service in this field.

The Court: A lifetime of service has extended through the Chief Justiceships, beginning with White and including Warren, and he, who has not read of the changes during that lifetime with the diligence that a lawyer has read, hardly gives opinion of the same likely persuasive power upon a District Judge.

Mr. Fritz: Well, I am probably mistaken but I had thought that this problem of this type of service was a rather unique situation which had not come to the attention of the Court anywhere before.

The Court: I have no doubt that every case is unique, and the quality of the lawyer, as Thomas Reed Powell, is the [fol. 591] ability to think of that which is inevitably attached R. 379 to something else without thinking of that to which it is attached.

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R. 381 Mr. Story: Well, your Honor, I am trying to show the distinction between local alarm service and central station service. One of the primary things is the difference in cost. I can bring that out very quickly.

The Court: Do you think I am going to go through all the economics of that in the findings and conclusions? Do you think there is one chance in 1,000?

* * * * * *

R. 384 [fol. 601] Q. In an effort to refresh your recollection, Mr. Guibert, I ask you whether or not these questions were put to you and whether or not you made these answers. A. Well, is there any doubt about it? Why do you want to clutter the record with those things?

Excerpts from Transcript of Trial.

Mr. Story: Your Honor, I would like to show that this witness has changed his testimony considerably since this deposition was taken until the day when he has testified.

* * * * * *

A. [Cont.] That's what I said, yes.

The Court: And is that your present view?

The Witness: My present view, in answer to counsel, **R. 385** [fol. 602] whatever you call Mr. Story,—he said, "Now," and my answer now is one and the same as it was before. He said "now".

The Court: Remember you are not a lawyer in the case even though you have been acting like that, giving me opinions. A. [Cont.] You said "now" and my answer to you now is one.

Q. Who owns his own system? A. Yes.

Q. And is that a certificated or an approved system? A. No.

Q. At the time this deposition was taken did you have a subscriber who owned his own equipment? A. Yes.

Q. Was he an approved or certificated system? A. Yes.

* * * * * *

R. 387 Mr. Story: Your Honor, I would like to bring up one point. It appears from the testimony up to now that this gentleman lives more than a hundred miles from this court or from the Rhode Island court, and that that was one of the witnesses that the defendants requested special permission of your Honor to bring here. They had adequate opportunity to take his deposition.

The Court: Now, Mr. Story, come. You don't think that I am going to interfere with Mr. Fritz' putting in everything he wants. I know perfectly well that he is going to for certain reasons try to fill this record, and I have made it clear, as clear as I can, that I don't think all this has much to do with it. I am going to patiently sit, and I think [fol. 606] you had better do the same.

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Excerpts from Transcript of Trial.

R. 390 The Court: I suggest that in order to expedite the matter, Mr. Fritz and associated counsel for the defense will between now and Monday next prepare an offer of proof with respect to the kinds of economic and like matters which have been covered by the last witness and undoubtedly will be covered by this witness and subsequent witnesses.

In view of the fact that, as it seems to me, these matters will be in the view of the Supreme Court of the United States irrelevant to any final determination of the matter, I am prepared, subject, of course, to the actual proffer to predict that I will reject the proffered testimony and that I will, therefore, have established a record basis for the defendants to argue to the Supreme Court of the United States that the material which they would have tendered would have been material and should have been received and was erroneously excluded by the District Judge.

In order that Mr. Story and counsel for the Government may usefully spend their time between now and Monday, [fol. 612] Mr. Fritz has indicated that he will make available promptly to Mr. Story and his associates those actual exhibits which are to be annexed to the proffer of testimony.

Those so-called actual exhibits, of course, will be rejected by this Court if it rejects the proffer made by Mr. Fritz. They are, as it were, appendices to the proffer.

Is that clear?

Mr. Fritz: Could I make one suggestion?

R. 391 The Court: Yes.

Mr. Fritz: Your Honor suggests,—and I take it it's no more than that—that we make such an offer by Monday.

I wonder if I could modify it to this extent: that I have the balance of this day and perhaps a part of tomorrow to consider whether we can properly do that or not. I don't want to do it without——

The Court: If you are going to consider it, I want you to go ahead now and have some associate consider it while you proceed with the case. I am not willing to otherwise recess the case if you are not willing to make the decision

now. I am not trying to say anything other than I don't want to waste time.

[fol. 613] Mr. Fritz: May I ask your Honor this? Does your Honor have in mind that the proffer would relate to all aspects of the case?

The Court: No. There certainly are things which clearly ought to be heard.

Mr. Fritz: That is what I am thinking about.

The Court. Absolutely. I am not trying to say you must offer your whole case that way. I am talking about that kind of economic argument which is addressed to what used to be called the Rule of Reason. That's all I am talking about.

That is, if what you rest your case upon is the peculiar situation of this industry and the necessity of otherwise prohibited practices being followed in this industry because of the connection between health, welfare, education, fire and other things and this particular set of alarms, then I am not in my view willing to hear all of that because I don't think the Supreme Court will hear anything on that.

If, on the other hand, what you are contesting is whether or not the Government's primary facts are true, that I want to hear that evidence.

I tried at an earlier stage to say that there were three [fol. 614] kinds of elements, it seemed to me, in an anti-trust case: Primary facts which are the actual conduct, verbally or in writing, of the defendants, and of those who are their employees, associates or others for whom they bear a responsibility; secondary facts which are, as it were, economic interpretation and opinion as to the significance and importance of the primary facts in the setting of the **R. 392** industry and in the setting of the type of product involved and the like.

That is, they are the kinds of issues which are in one sense opinion issues. They are the normal province of economists. They are the kind of material as to which theoreti-

cally informed people may testify and practically experienced persons in the trade or industry may testify.

In either event they are not primary in the sense that they do not relate to the acts, letters, documents, words, and the like of the defendants and their associates. On the contrary, they are a method of measuring the value and importance, the justification or lack of it of the conduct covered in the primary facts.

Then there is a third level in an antitrust case which is the level of legal opinion, the rule of law, the kind of mate-[fol. 615] rial which is involved in per se doctrines, the kind of material which used to be involved in the Rule of Reason doctrine, the kind of material which is dealt with by judges in their opinions either in the Supreme Court or elsewhere.

With respect to the primary facts. I do not want you to make a mere proffer of evidence. I want to hear everything which relates to an act, a written or oral expression, or any other conduct of any defendant, any of the officers or employees of any defendant, any associate of any defendant including, of course, any alleged coconspirator.

But with respect to the second level, the level which deals with what I have called secondary facts, material regarding economic opinion or other value opinion, I see no reason not to allow that to be presented in the form of a proffer of evidence, because in my judgment that kind of material will not be regarded by the Supreme Court of the United States or by this Court following the Supreme Court of the United States as this Court understands the Supreme Court.

Have I made myself as clear as the subjects admits of? [fol. 616] Mr. Fritz: Well, I think so. I think what your Honor is saying as to this secondary phase of the matter—it relates essentially to our contention of what the market is in this case.

The Court: Oh, no, no. If you are talking about what is the market, that is not so. That is a primary fact. What

R. 393 is the market is a very primary fact. And I don't want you to think that you can get through with that on a proffer of testimony. But I must say market does not turn on questions as to whether something is leased or sold. It is important to know what percentage of the market cover sales, or what percentage of the market is devoted to sales, or what percentage of the market is devoted to leases. But as to which is a better way of doing business, or which is riskier, that has nothing to do with what is the market. That has to do with a very different kind of question.

You are really trying to argue, if I understand you correctly, the same kind of thesis which was unsuccessfully argued in the DuPont Cellophane case, the case which Mr. Justice Harlan, when he was counsel, was involved in at one stage, and others.

I just don't think there is anything to that as a matter of law. But that does not mean that I do not want to know [fol. 617] what are the facts as to how much cellophane or how many cellophane sales there are and how many tin foil wrappers there are. I am quite willing, more than willing to take all the primary facts. But what the value of those facts is, economically or otherwise, seems to me not to be a matter which has to be covered by examination and cross-examination.

Have I made it a little clearer?

Mr. Fritz: I think so.

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Mr. Fritz: During the recess we tried to come up with a few thoughts. I feel that in the interest of a proper understanding that I ought to say to you what I think we can do, so that we do not come back on Monday not having done what your Honor might expect us to do.

There are two areas, large areas of proof which in part might be thought to be under the heading of the Rule of Reason but would also bear on the question of relief in this case, no matter how it was approached, and that is the

R. 394 question of the importance of the retention of title not only from the aspect of the witness, who described it this morning, but from the aspect of pricing and the effect upon customers, concerning which we have some further testimony.

And also we had planned to offer to your Honor through three witnesses, and this is a combination, a very short statement of what they might say, evidence as to the contribution and importance by way of research and development to the industry as well as to the Government and national defense, and the high standards of service that have made it possible to render emergency relief to the [fol. 619] public in times of catastrophe, and things of that sort.

Now as we see it, during this short period we had to look at it, this will encompass the testimony of three witnesses and some portion of the testimony of one or two others but not in their entirety. And we have tried to make an estimate so your Honor will see whether it is worthwhile or not of the time element involved, but, of course, it would be only an estimate, our estimate of the time these witnesses would take to develop their testimony as we have it planned would be about a day and a half.

Now in addition to that, I have a further suggestion to make, and I know it does not fall quite within the category of what your Honor talked about this morning. It really enters into the question of market determination, but it is a little on the detailed side, and we possibly can save some time.

I had planned to call here two or three witnesses, who are police chiefs of neighboring areas of this City, and who are only two out of about 60, as I understand it.

The Court: Sixty?

Mr. Fritz: Sixty, yes, your Honor. And who would only [fol. 620] portray a sample of what the competitive situation is as between direct connected service and central station service, and that, of course, I don't think could be a

subject of much controversy, and I thought possibly we could give Mr. Story a preview of what we propose to do, and maybe we can embody that in some type of offer and maybe save some time there.

In addition to that we had planned to call an official of R. 395 the New England Fire and Insurance Rating Organization bearing somewhat on the same topic. There I think that we would probably add another at least half-day's time.

Now this is about all that we could come to with any degree of certainty at this lunch period.

The Court: You have been very helpful. May I ask you whether if I did not interrupt you but allowed you to go straight ahead without any interruption, do you think you have more than five or six days of testimony?

Mr. Fritz: Oh, I think so, sir.

The Court: How much more?

Mr. Fritz: Well, I haven't really tried to total the number of days but there are—may I take a minute to see if I can come up with some such estimate as that?

[fol. 621] The Court: Surely.

Mr. Fritz: A rough look seems to say——

The Court: I understand.

Mr. Fritz: It seems to say a minimum of six days.

The Court: Well, I think in the light of that——

Mr. Fritz: That would exclude this, of course, that I was talking about before.

The Court: Yes. But if you had that it would make another day and a half or seven and a half days?

Mr. Fritz: Two days, perhaps.

The Court: I think that in view of that I am going to withdraw my suggestion about a proffer because I think that if you can get in your testimony, as I believe you can, in a two-week period, that is eight days, it is worthwhile to have the record full enough so that if the Supreme Court does not take the view I think they are going to take they will have before them a complete record and not merely a proffer of evidence.

Excerpts from Transcript of Trial.

Mr. Fritz: Well, I think, frankly, we could make an ample substitute for that full treatment in a proffer cover-
[fol. 622] ing this.

The Court: No. I think I will let you go ahead. And may I say this. I think that with respect to items such as the value of this industry in a period of war, and so forth, I am going to discourage the Government from cross-examining on that kind of issue. If it be relevant, it is relevant. I don't think there is much to the point but I may be wrong. I don't, however, think that I could actually decide such a question without a very long and intensive consideration R. 396 of all kinds of things. It is quite enough that you offer the evidence.

I am telling you right now I am going to, with respect to that, say, "Evidence was offered with respect to this point but was regarded by the Court as of no consequence." That is the way I am going to treat it. And I am going to treat other items in the same way, that is, many that you referred to.

If you are going to refer to research, then I am going to say, "That is not the window glass era any longer." This is not the Appalachian Coal era any long. This is Black, Douglas, Warren, Brennan, Goldberg, et al. era.

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R. 398 The Court: There used to be a man at Yale or the Taft School who used the word "thobbing" when he wanted to describe something which was not thinking but having to do with emotion. So far as I am concerned I think quantitatively and I am not in the least concerned with loose, general statements not backed up precisely with facts, percentages, dollars, incidents. Adjectives which characterize something may mean one thing to the speaker and another to the listener. High, low and the like tell nothing unless you know whether they are high or low with respect to something specific.

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R. 405 The Court: What goods, services and the like are covered by these forms, please?

The Witness [RAY BRECHBILL, ADT General Sales Manager]: Sir?

The Court: What goods, services and the like are covered by these forms?

The Witness: This form enables us to know what——

The Court: No. What kinds of competitive goods, competitive services and the like are covered in the reports on these forms?

Q. Do you understand the question, Mr. Brechbill? A. I believe I do. Any protection service that is offered [fol. 640] in competition to our own service.

R. 406 The Court: Any physical goods?

The Witness: It would be a protection service.

The Court: No. Is there any case in which there is a transaction involving the sale of a tangible article which is reported on this form?

The Witness: Yes, sir.

The Court: What tangible articles, which are sold, are reported on these forms?

The Witness: A proprietary system that we sell outright would be reported on this.

The Court: I see. The whole of the system, that is the physical layout apart from any service?

The Witness: A proprietary system that we would sell, for instance.

The Court: Now you see you are using the word "system."

The Witness: Yes.

The Court: In the sense of including not merely tangible articles but services together with those tangible articles constituting in toto a system, aren't you?

The Witness: I am thinking of——

The Court: Aren't you?

[fol. 641] The Witness: No. I am thinking of a tangible system without a service.

The Court: I see. So it is equipment?

The Witness: Yes. We would report that on this as well.

The Court: You would report the sale of equipment without any service on that form?

The Witness: We would, sir.

The Court: All right. Now is there a schedule as to the charge for that equipment, such as you described a little while ago, as normal pricing?

The Witness: Yes. There is a schedule for the make-up of that.

The Court: All right. So that there is a normal price for the equipment and there may be an occasion on which the equipment is sold for more or less or the same figure as the norm, is that right?

The Witness: Yes, that is true.

The Court: And when it is not sold at the same figure as that which is set forth in the norm, are you aware that there might be questions which would arise under the Robinson-Patman Act?

R. 407 The Witness: I would say that we are, sir.

The Court: And have you instructions to your salesmen [fol. 642] with respect to such problems as arise under those circumstances?

The Witness: I would feel that we do have, sir.

The Court: And where are those instructions? In writing?

The Witness: Yes, sir.

The Court: Where are they?

The Witness: They would be in our commercial instructions. Again I have none of them here. But we have advised our people with reference to competitive pricing.

Q. Mr. Brechbill, his Honor just questioned you about the sale of a system. Could I go back for a moment? You have told us this morning that your company, the ADT Company, sells central station protection service, is that right? A. That is correct.

Q. And it also offers direct connected service in which there is no sale of equipment to a customer, is that correct? [fol. 643] A. I beg your pardon?

Q. Direct connected, I say, does not involve the sale of equipment.

The Court: It is like the telephone subscribers' relationship with the telephone company?

The Witness: That is right.

Q. The only instance in which sales are made by the ADT Company is in connection with what you were just discussing with the Court, namely, the proprietary system, isn't that right? A. That is essentially true.

Q. What? A. That is essentially true.

The Court: What does the word "essentially" mean in your answer?

Q. That is, what the word comes from——?

The Court: What does the word "essentially" mean in your answer—"That is essentially true"? What is non-essentially false about it?

The Witness: The reason I used that term is because I think in a very limited number of cases we have sold a **R. 408** system to the subscriber that has a connection to our central station.

[fol. 644] Q. What I want to get at is this: Isn't it a fact that these proprietary systems are usually custom made? You don't keep them on the shelf, do you? A. We do not, sir, no.

Q. And do you have a fixed price list for a proprietary system in ADT? A. No, we do not.

The Court: Well, I don't understand then how you could answer as you did my question.

I asked you whether this sale of a system which you defined as an equipment was or was not in accordance with a norm which you had previously referred to, and I asked you whether there were cases where it sold for more, less or the same as the norm, and I do not see how you could have answered any of these questions if what you were talking about was a custom-made equipment system not normal in its character.

Can you explain that?

The Witness: What I meant was this. Perhaps there is a misunderstanding. I meant that for such custom-built systems we have normal procedures of charges based on costs.

The Court: That is obviously not what I asked. I asked you whether there were cases in which you sold tangible [fol. 645] articles, and you said Yes, there were such cases, to wit, systems—to wit, equipment.

I then asked you whether in selling such equipment or system you sold with reference to a norm and you said Yes.

Then I asked you whether there were cases where you sold above or lower or at the same level as the norm, and you said Yes. And the only fair inference which any court could draw from that was that you were talking about the sales of standard articles.

Moreover, I asked you if you realized if there was a Robinson-Patman problem, and you said there was, and, of course, I am sure you know enough about the Robinson-Patman Act to know it has nothing to do with situations where there is a sale of a particular custom-made article for one particular purchaser.

R. 409 So you either have misled me or misled Mr. Fritz or maybe both of us.

The Witness: I must plead ignorance there, your Honor. I had reference to the norm figure based on markups over cost, and, if I misled you, I am sorry. I didn't intend to.

The Court: How is that a Robinson-Patman question?

The Witness: I am not as familiar, sir, as you are.

[fol. 646] The Court: Well, I am not familiar with it. I always find myself in difficulties with regard to it, but I know it doesn't apply to a single custom-made article made for a particular customer.

Q. Did you know that, Mr. Brechbill? A. No, I did not.

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R. 413 The Court: Mr. Schultz [ADT sales official], you are not trying to give me the impression that this is an

exercise in mathematics in which anybody sufficiently skilled with the prices and the pieces of equipment could arrive at the price, are you?

The Witness: Well, firstly——

The Court: Are you trying to give me that impression?

[fol. 654] The Witness. No.

The Court: What else enters into it besides the multiplication?

The Witness: You have to determine what equipment will be required.

The Court: Well, what else?

The Witness: And that's it.

The Court: You mean it makes no difference whatsoever what anybody else is offering to perform the same service for—none at all; is that your testimony?

The Witness: Yes, sir.

Q. Do you mean that, Mr. Schultz? The Court is asking you, if I may be pardoned——

The Court: Oh, I don't think I need any answer. I will

R. 414 allow the witness' answer to stand. If that is his testimony I will take it for what value it has. I think I am able to form my own opinion of the witness without the leading of his counsel.

Mr. Fritz: Well, I would like to put this question.

The Court: No, there is no need to impeach your own witness.

Mr. Fritz: I am not going to impeach him, sir.

The Court: No.

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R. 427 Q. Well, in the national account area, Mr. Schultz, are there any companies that were national accounts of ADT that had central stations that left that category and took no other types of service? A. Yes, there are several of them.

The Court: I haven't any doubt this is true. It is unimpressive except measured quantitatively.

Excerpts from Transcript of Trial.

Mr. Fritz: I am talking now, if your Honor please, about a change by very large organizations from central station to local alarm and to insurance as a different method of [fol. 678] protection.

The Court: I have no doubt it takes place. The question, however, is its frequency as shown in some adequate statistical manner.

I am not going to be impressed. I am just trying to help you by telling you I am not going to be impressed by these sporadic instances. I know all kinds of sporadic things take place in a large enterprise, an enterprise as large as this. I tried to make it clear that, in Mr. Justice Holmes' phrase, I think quantitatively.

Mr. Fritz: Well, I understood, your Honor, of course. I think that there is some qualitative value to knowing that some large organizations look at local alarms as being better or equivalent to the type of service we are talking about in this market, and that is my only point.

The Court: Well, Mr. Fritz, maybe we are incapable of getting together on the point, but I do really feel rather strongly about this. I think that your attempt to have me look at this in a dramatic qualitative way by special epi-
R. 428 sodes might be appropriate if you were addressing a jury or, indeed, if you were involved in the question of subjective intent under the antitrust laws.

[fol 679] My notion may be mistaken, but it is certainly a very firm one—that the problems under the anti-trust law are generally statistical and quantitative. The Government dresses up its case as though there were something wicked by a defendant in an antitrust proceeding.

Mr. Fritz: I am sure of it.

The Court: But I am not much impressed by melodrama on that side nor am I much impressed on the other side by pictures of the innocent, ravished maiden. I don't really think that either one of these situations describes the economy in which we function.

The economy in which we function is a statistical picture, and it is very difficult indeed under the traditional notions of question and answer in a court room to keep in mind the economic nature of the inquiry.

It is not an accident that the view of McKenna, J., with respect to size might be viewed differently by Justice Cardozo, and that has now lapsed entirely into the limbo of the discarded notions ever since the Aluminum and other cases.

It is quite plain to anyone who is willing to look freely and without prejudice at the situation that the present [fol. 680] majority of the Supreme Court of the United States, whether wisely or not, regards itself as a governor of the economy in terms which are exactly parallel to those which would be used by a department of economics in estimating situations.

Now one may or may not be sympathetic with this, and I don't want you to suppose that merely because I am indulging in this gratuitous exposition, I am necessarily of the view that this is sound. Indeed, I think that the article I wrote about Mr. Justice Brandeis, which appeared in the Atlantic Monthly and was republished in their volume, The Atlantic Harvest, shows that I am not an unreserved admirer of the present doctrine with respect to the anti-trust laws.

But it doesn't make any difference whether I am an admirer any more than it makes any difference whether your clients like it. We are both subject to the law of the land, R. 429 and the law of the land is what five judges say it is. And all that I have been trying to do in this proceeding is to stay within what I understand to be the now prevailing views, or those likely to be prevailing by the time this case gets to a higher court if it gets there.

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The Court: When did this complaint begin?

Mr. Fritz: The complaint begins—Well, that is a very R. 430 difficult question to answer. There are all kinds of

dates in this complaint going back to 1907 as far as certain types of documents are concerned, but there was a cutoff period of 1951 for production purposes, and I think the last five years for other matters of interest.

The Court: How far should this go back when I make the really important findings, if I make them, Mr. Story?

Mr. Story: Well, your Honor——

The Court: That is easy. Now, what is the answer—— not "well, your Honor", quickly?

Mr. Story: Well, Judge Sweeney——

The Court: I didn't ask you about Judge Sweeney.

[fol. 683] Mr. Story: 1951.

The Court: All right. That is ten years ago or later.

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R. 431 The Court: This man's [*i.e.*, Schultz's] testimony is just of the same value as anybody else's who speculates on a third person's motives, like your speculation on my motive which hasn't proved to be entirely reliable.

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June 17, 1964

(Third Day)

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R. 442 Mr. Williams: If your Honor please, I have a number of tabulated exhibits which have previously been numbered by the Clerk, and I would like to offer them into evidence at this time.

The Court: Is there any objection?

Mr. Story: Yes, your Honor. I would like to object, first of all, to this witness' testimony [*i.e.*, that of Edward Gaston, ADT Data Processing Center Manager].

The Court: Well, no. The question is the admission of the exhibits.

Mr. Story: I haven't read them, your Honor. I am in no position to——

The Court: May I make a suggestion here. I suggest you do not object. My view of this testimony is that it is

highly immaterial and most irrelevant. It is not going to [fol. 706] affect me in the slightest. It is one of these things that I am allowing in. It is the equivalent of an offer of proof. I don't think for a moment the Supreme Court of the United States is going to pay the slightest attention to all of this, but the defendants are entitled to find it out and not to believe me.

Mr. Story: Under those circumstances, your Honor, and referring to your Honor's statement of the first day, the Government does not have any objection.

The Court: Admitted in toto. I am going to allow the defendants to put in the kitchen sink. Some day some defendants' lawyers will be told by some Supreme Court Jus-
R. 443 tice as plainly as possible that we are no longer interested in methods of defendants' counsel trying to induce judges to amend the antitrust laws and to take from the full intent of Congress the full impact of the statute because the judge happens to have an economic sympathy or to have some kind of other reason for wishing that the antitrust laws were not written as they have been written.

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R. 446 Mr. Story: I have no questions, your Honor, but I would like for the record to make a motion to strike the entire testimony of this witness because it is completely irrelevant and immaterial to the issues of this case.

The Court: I grant it. I think it is quite obvious that I am merely making a more, I hope, satisfactory technical basis for appellate consideration than would be involved in a mere offer of evidence and a rejection of the offer of evidence. I think that this is a clearer way of letting the Supreme Court see what a proffer of evidence would be because I am admitting the evidence but I myself think it has no possible bearing on present doctrine in the Supreme Court of the United States.

Mr. Fritz, Jr.: Sir, may I point out the respect in which these defendants believe this document is relevant?

The Court: Surely.

Mr. Fritz, Jr.: There has been certain testimony given in the course of depositions which have been put in evidence, and the Government has contended that local alarm [fol. 713] users are almost exclusively establishments with very low inventory values or, as the Government at one point stated, the "Ma and Pa corner soda pop store", or something to that effect. This is intended to bear on that contention.

The Court: If it comforts you at all, I think that the United States also has introduced a host of irrelevant material. Some day someone is going to learn that these lengthy antitrust cases are nothing but a reflection of the inability or unwillingness of counsel on each side to read accurately the opinions in the Supreme Court in the last five years.

An antitrust case properly prepared can generally be presented in as brief a period of time as an automobile accident case—believe it or not—and the day will come when you will all see a resolute judge of the Supreme Court of the United States say exactly what I have said. Someone will have the courage.

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R. 484 Mr. Fritz: If your Honor please, the suggestion has been discussed among counsel and we just offer it to your Honor as a thought,—we were wondering whether your Honor would be interested to see and examine and inspect a central station.

The Court: Not at all. Thank you.

Mr. Fritz: Very well, sir.

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Excerpts from Transcript of Trial.

June 22, 1964

(Fourth Day)

R. 529 Q. Did you [William F. Hable, General Superintendent, ADT Service Department] keep some record of the time and equipment costs required to accomplish that repair [*i. e.*, of 1951 Kansas City flood damage]? A. Yes, we did. It was just shy of $100,000 for equipment and labor costs to take care of that flood.

Q. Was any part of that replacement cost billed to any customer? A. No. We owned the equipment. It was up to us to replace it free of charge, free to the subscriber.

R. 530 [fol. 864] Q. Did you have any other instances that come readily to your mind of similar situations? A. Yes. We had floods not of that force.

Mr. Story: Your Honor, I object to this.

The Court: Well, what harm does it do the Government?

Mr. Conkling: I beg your pardon?

The Court: I said "What harm does it do the Government"? This is an exercise in trying to persuade Congress or five Justices of the Supreme Court but it won't have the slightest effect on me.

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R. 543 The Court: Mr. Story, do you really think I am going to decide this case on the basis of the kind of testimony you are trying to elicit? I tried as best I could to make it clear to both of you that though each of you has a theory appropriate to this case which is characteristic, **R. 544** respectively, of the Government and of the defendant, I think nothing of those theories.

I think the notions the Government has that there is some drama and color and hot-and-cold character which this Court ought to take into account is an aberration on the part of the Government.

I think the notion that the defendants have that cross-elasticity of demand, such as in the case of cellophane

cigar wrappers went out of the effective vocabulary of antitrust defendants, is also an aberration.

I do not believe it makes the slightest bit of difference what is being shown in this case by both sets of counsel. I am sure that there is a cross-elasticity of demand between Ford cars, yachts, bicycles, trips to Europe, education for children, etc. I am sure that the market for amusement is unending. I am likewise certain that on [fol. 891] the respective problems of fire, police and other professions the market is unending.

I am quite certain that the market as it will be defined by the Supreme Court of the United States has nothing like the range that the witnesses in this case have tried to induce this Court to accept. I am quite sure that in the long run the Supreme Court of the United States is going to take about as narrow a view of the market as the circumstances here permit.

Mr. Story: Your Honor, after careful consideration, I have decided I have no other questions.

Mr. Conkling: Thank you, Mr. Hable [General Superintendent, ADT Service Department].

Mr. Story: May I suggest a luncheon recess at this time, your Honor?

The Court: I don't. I have been unbelievably generous, according to my standards in allowing recesses. Go ahead.

Mr. Conkling: I withdraw the request.

R. 567 Q. Mr. McDonald, [ADT's chief fiscal officer] of course you are familiar with the existence of the old March 29, 1907 agreement, which is in evidence in this case, are you not? A. Yes. I am.

Q. Are you familiar with the negotiations between the Grinnell Corporation and your company which led to the termination of that agreement in the preparation of the Device Sales Agreement in the early 1950's? A. I am familiar with them.

Q. Did you participate in them? A. In every one.

Q. Will you tell us briefly what the negotiations were and how they developed and how they finally were consum-

mated? A. They commenced in 1946 and they continued with some interruptions until 1952. Initially, I think both sides were contending for something like a continuance of the existing 1907 agreement, with perhaps some modification of the proceeds on each side.

[fol. 935] Q. Would you keep your voice up a little bit. A. However, in 1951, our attorneys, who were helping us with the negotiations, the firm of Milbank, Tweed, Hope and Hadley, told us out of the blue that they felt the 1907 contract was perhaps tainted with some antitrust difficulty, and that for fear of violating the antitrust rules we might not perpetuate the 1907 agreement in any manner, shape or form.

Q. Is that the first time you had ever had any intimation or opinion of that kind? A. Exactly.

Q. During those negotiations was there any contrary legal opinions voiced to your knowledge? A. Oh, yes, there were.

R. 568 Q. By whom? A. I don't believe the attorneys for Grinnell believed this to be the case. They had some plausible argument but they did not prevail against the advice of our own attorneys.

Q. And so you proceeded to do what? A. We proceeded to do this. We recognized that Grinnell had furnished and installed actuating devices within the premises of subscribers for sprinkler supervisory [fol. 936] and waterflow alarm service.

Q. Was that everywhere, where ADT had been furnishing service through its respective companies throughout the country? A. Everywhere.

Q. All right. A. We had been, since 1915, under the advice of our own attorneys, that Grinnell owned these devices that they furnished and installed. We were faced with this quandry.

The agreement did not have very long to run to maturity. We expected to remain in business a long time after that. We had to have these devices that were Grinnell's. We had to operate them. Therefore, we realized that we were going

to have to make some arrangement either to lease them or buy them.

With the approval of our attorneys, we resumed negotiations with Grinnell but only on the basis of buying, or in some way getting the right to use these actuating devices, which Grinnell had in the subscribers' premises.

We argued our extremes of position until about the [fol. 937] middle of 1952, with Grinnell contending that the devices, in their opinion, were worth to the ADT 20 per cent of collections from subscribers for the length of time such collections should be made.

Q. In the contracts then in existence, I take it? A. In contracts then in existence—which would be in existence at the termination of the contract.

Q. Yes. A. ADT was contending for not more than a 15 per cent share of collections. Actually, a bargain was struck and a handshake effected, and this for a precise composite of those two figures, 17½ per cent of frozen collections from subscribers. It was made clear that where a contract increase should take place Grinnell did not share in that R. 569 contract increase. The purchase price, the installment payments remained, 17½ per cent of the rental, as it existed at 2-18-54.

Q. Did that result in the letter agreement of December 29, 1952? A. Correct.

Q. Which in this case is Government's Exhibit 89 [*i.e.*, at R. 1434]? A. Yes. One other thing that I should mention, Mr. Fritz, is this. When we resumed negotiations with [fol. 938] Grinnell, following this 1951 disclosure, our attorneys made it crystal clear that no payment to Grinnell must contemplate the Grinnell Company was not to compete with ADT for they said that this would be violative of the statutes too.

Q. There was no such covenant? A. No, sir, there was no such covenant, no such thoughts in our mind. Grinnell owned the actuating devices, which we needed, which we

had to have. We purchased those devices for a satisfactory price. That is all we got from Grinnell.

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R. 570 Q. This Device Sales Agreement that you [McDonald] mentioned before was consummated in point of time, was it not, prior to the acquisition by Grinnell of the 62½ per cent of the ADT stock formerly held by Western Union? A. It was a complete and clear an arms length negotiation concluded in 1952. Grinnell did not acquire any interest in ADT until 1953.

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R. 571 [fol. 942] Q. Are you familiar, Mr. McDonald, with the increase in the number of approved central station companies since 1945? A. Yes. In 1945 there were eight such approved companies. There are now 42 excluding the defendant alarm companies.

Q. You are aware, are you not, that in this case the Government has proposed that there be some type of divestiture on a local level, that is, on a city-by-city basis, using as a break-even point $125,000 and a population of 150,000 people? A. I am familiar with that.

Mr. Story: Your Honor, I object to that. I don't see any reason whatsoever that we should get into the relief portion of this case.

The Court: It is perfectly proper because, so far as I am concerned, if you prevail, I am going to write a decree without any further delay. There is not going to be a second hearing.

Mr. Story: Your Honor doesn't plan to have a hearing on relief?

The Court: Not at all.

Mr. Story: Very well. Very well. No objection.

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R. 576 [fol. 925] *Cross-examination by Mr. McInerney:*

Q. Mr. MacDonald, I take it from your testimony you were an officer of ADT both before and after the Grinnell

acquisition of the controlling stock in ADT, were you not? A. Yes, sir.

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R. 577 Q. Did Grinnell make any change in the management of ADT as a result of its acquisition of the stock from Western Union? A. None whatsoever.

Mr. Story: I object.

The Court: You may answer that question. What was the answer?

The Witness: None whatsoever.

[fol. 953] Q. Did it make any changes in the operations of ADT? A. No, counselor. Grinnell did not know the operations of ADT. It relied strictly upon its officers to run the business.

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Q. You mentioned in your testimony a hand-shake meeting sometime in the middle of 1952, and I would like to show you what has been marked JRG-69, which appears to be a memorandum with respect to such a meeting, signed [fol. 954] by you. Would you identify that for us, please? A. Yes. That is the transcription I made of what transpired at that meeting shortly after its occurrence.

Q. And what was the date of that meeting again, please? A. June 16, 1952. Transcribed on June 17th.

Q. Can you give us approximately, if you will, the date R. 578 on which you first learned that Grinnell had acquired or was about to acquire an interest in ADT? A. That would be not earlier than May 1963.

Q. 1953. A. 1953. I beg your pardon. Mr. Walter Marshall of Western Union called Mr. Gaston down and told us about it. That was the first we knew.

Q. Had the acquisition taken place by that time? A. No, but it was pending.

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Excerpts from Transcript of Trial.

R. 585 The Court: If I understood you [ROBERT J. FAHEY, market research specialist, Arthur D. Little, Inc.] correctly, you thought from the point of view of the supplier that there was a number of different markets?

The Witness: I beg your pardon?

The Court: You understood from the point of view of the suppliers that there were a number of different markets? Were there not? A national suppliers' market? There was a number of local suppliers' markets?

The Witness: We recognized the possibility at the time.

The Court: As I understood your statement, you pro-[fol. 969] ceeded, as you described it?

The Witness: No, sir. We chose a variety of areas for the purpose of sampling this national market without making any judgment as to whether there was a series of local markets or national markets.

The Court: You understood I was not talking about the consumer.

The Witness: Yes, sir.

The Court: As I understood your statement, you proceeded in certain cities to look at the Yellow Pages, is that right?

The Witness: Yes.

The Court: In that aspect, if you proceeded in Boston, you treated Boston as a market?

The Witness: We treated Boston really as part of a national market.

The Court: Part of a national market? I thought you **R. 586** said you then treated or you looked at concerns which were in the national market. Didn't you say that?

The Witness: We were attempting to define——

The Court: Didn't you say that?

The Witness: I may have.

[fol. 970] The Court: I thought you did. Maybe I misunderstood you. I just wanted to point out that when you were looking at it from the point of view of the suppli rs,

you treated the situation as one with many potential kinds of markets.

The Witness: Well, I don't think I was.

The Court: I don't want to trick you. It is too easy.

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R. 588 The Court: Why don't you get the report [i.e., D. Ex. WW, R. 3863]? I know how these things are done. I have had economists working with me and against me. I know Arthur D. Little and respect the company. At the same time, I think I know that this is ultimately not a question that the Arthur D. Little Company is going to solve.

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R. 591 Q. Did you [Fahey] discover alarm system users owning more than one location who used one form of service at a location and another at a different location? A. Yes, we did.

The Court: Did you ever know of a man who was considering whether to buy a four-in-hand tie or a bow tie or a shirt which did not require any kind of necktie?

The Witness: A four-in-hand?

The Court: I am just pointing out to you—the fact that the customer considered three different possibilities does not prove that the three different possibilities constitute one market from the point of view of the antitrust laws.

The Witness: Yes, sir. I came to no precise conclusion about the percentage of other forms of electric protection service which compete with central station pro- [fol. 980] tection service. Nevertheless there was evidence that in certain instances as users approach the decision as to whether they want to buy electric protection service, what protection to buy, they solicited bids for several kinds of electrical protection service, and even went beyond that to secure bids from watch agencies, guards and watchmen, and certain responders considered insurance protection as

providing an interchangeable service in combination with or instead of central station protection service.

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Q. Mr. Fahey, have you reached a conclusion as to the validity of the market asserted by the Government, i.e., a market consisting solely of accredited central station service? **R. 592** A. Yes. I think so far as the economic workings are concerned in competition, effective competition is concerned, that it is an over-simplification.

Mr. Story: I did not hear that.

The Court: It is an over-simplification.

Mr. Story: I still did not hear.

The Court: It is an oversimplification. He is telling [fol. 981] me that if I am right the Supreme Court ought to deny the i.e.

Mr. Fritz, Jr.: That is all for this witness, sir.

[fol. 982] Q. Perhaps you can explain to me why you find that to be an oversimplification? You apparently find something else present in the market. A. Without being able to define it precisely, the precise percentages, I come to the conclusion that some portion of each of these other electric protection services,—and, indeed, some portion of the guard services, and even possibly—and we had evidence to indicate this,—some portion of insurance competes effectively with central station service.

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June 23, 1964

(Fifth Day)

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R. 602 Q. Did you [Andrew M. Rouse, research associate, Arthur D. Little, Inc.] reach a conclusion as to whether

accredited **R. 603** central station service in that city constitutes a separate and independent market? A. Yes.

Q. What was that conclusion? A. That it did not.

Q. Incidentally——

The Court: Is he testifying as somebody who graduated from a law school, or is he testifying as an Arthur D. Little employee, or is that supposed to be a question of fact or a question of law?

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R. 609 The Court: In your experience [that of Lawrence J. O'Brien, President and former Vice President of Sales of ADT], at the beginning will you tell me whether all of the competitors named, so far as you are aware, in those reports were companies roughly of that size and nature?

The Witness: Of vast size and nature?

The Court: I did not use the word "vast." If you would like to put that in, that would satisfy the Government.

The Witness: I did not hear.

The Court: "That size and nature" is what I said.

The Witness: If I understand the question: Are all the companies covered in these reports——?

The Court: At the beginning.

[fol. 1016] The Witness: As this company here? No, sir.

The Court: Were there any cases of companies which did not supply automatic alarm systems?

The Witness: There were cases——

The Court: Were there?

The Witness: ——that did not, yes, sir, your Honor.

The Court: What percentage of the total of the reports covered such companies?

The Witness: I couldn't give you an estimate

The Court: Five per cent?

The Witness: I couldn't give you an estimate.

The Court: You couldn't help? You mean you can't tell me whether it was five or 50 per cent?

The Witness: No, sir.

Excerpts from Transcript of Trial.

R. 610 The Court: Do you think then that I think you are very familiar with this material?

The Witness: I was familiar, your Honor, with the issuance of this form.

The Court: Well, what I am asking you is: are you familiar with what the reports were when they came in?

The Witness: Each report?

The Court: No, as a total body.

[fol. 1017] The Witness: Yes.

The Court: I am familiar with the fact that 90 per cent of the witnesses who testify in this courtroom are men and not women. Haven't you got some kind of impression as to whether 90 per cent of the reports you received and looked at related to automatic alarm companies?

The Witness: I cannot say that.

The Court: You don't know?

The Witness: No, sir.

The Court: You are not sufficiently informed? Is that your testimony that you want me to believe?

The Witness: Your Honor——

The Court: Is that the testimony you want me to believe?

The Witness: All I could do would be to make an estimate, your Honor.

The Court: Your credibility is an issue in this case.

Q. Have you had any occasion, Mr. O'Brien, in the ordinary course of your work to make a comparison, that is, a statistical comparison as to the number of these competitive reports that refer to central station protection [fol. 1018] service as distinguished from local alarm, direct connected companies, automatic fire alarm companies? A. I never made any such breakdown.

Q. And is that the reason why you are unable to give the Court a percentage? A. It would be a pure estimate, and I have no real basis for it.

The Court: I said that I was able to estimate the number of men and the number of women who testified in my

courtroom, and I tried to give you a sufficient lead to indicate that one need not make a head count in order to have a reliable impression.

R. 611 Mr. Fritz: May I have just a second, please?

The Court: Yes.

Mr. Fritz: I would just like to call to your Honor's attention that there is an exhibit that was put through Mr. Gaston that touches on this problem with respect to all types of service.

The Court: I have no doubt that there are other sources. If I have to give relief in this case, I want to know about how fully informed the corporate officers are, and whether they should be by the corporation excluded [fol. 1019] from further employment on the ground of their failure adequately to follow the central business of the company and its degree of compliance with the antitrust laws. I hope I have made that so abundantly clear that you will not be surprised by any of the terms of the decree.

Q. Mr. O'Brien, you said that you appointed three assistants to take care of three regions of the country, when you became sales manager, is that right? A. That is right.

Q. What was the volume, as you saw it, of the reports of various kinds, contracts and associated papers, that came into your sales office during the time you were general sales manager? A. The administrative force in the Sales Department was geared to handle approximately a hundred contracts a day, with all the collected papers. There was one occasion, while I was sales manager, at the end of a sales campaign, where they handled in excess of a thousand.

Q. Now did every document that came in from the field relating to sales come to your attention? A. No, sir.

[fol. 1020] Q. How was that handled as a matter of distribution when it came into the office? A. The three assistants to the general sales manager had certain delegated authority. When the mail came in the chief clerk directed

it to these men, as she—well, as it fitted her procedures, and some of course went to my administrative assistants, which she felt were over and above what they might normally handle.

Q. Was it distributed among the three men representing the three regions that they covered?

* * * * * *

R. 620 Q. Did you [O'Brien] talk individually to these people [ADT salesmen] on the occasion of their coming in to New York about this situation [*i.e.*, dealings with competitors]? [fol. 1036] A. Continually.

The Court: Did you refer to the General Electric case in Philadelphia?

The Witness: Pardon me?

The Court: Did you refer to the General Electric case in Philadelphia?

Mr. Fritz: I don't think that had prominence at that time that it subsequently attained at the time of this meeting.

The Court: No. I asked him when he brought the men in—did you know about the General Electric case in Philadelphia?

The Witness: Yes, your Honor.

The Court: Did you know about it at the time of the meeting with these men?

The Witness: I can't say.

The Court: When did you first hear about it?

The Witness: I followed it as it developed.

R. 621 The Court: Then you must have known about it for a great many years if you really followed it as it developed. When did you first learn about it?

The Witness: Well, I learned about it, I suppose, in its terminal stages.

[fol. 1037] The Court: That is, when it became alarming?

The Witness: Your Honor, in my sixteen or seventeen years in this business I have never done a single thing nor

condoned a single thing in respect to competitors in this business, and I think that's my reputation amongst the competitors, I believe.

Q. Mr. O'Brien, so far as the General Electric case is concerned, I suppose you knew what appeared in the newspapers from time to time, did you not? A. Yes, sir.

Q. Did you know anything else about it beyond that? A. No, sir.

Q. And in connection with this meeting that you had with your sales managers did you ask them to go back and examine the situation in their own areas, to see whether or not possibly there were any other situations such as that claimed to exist in Washington?

The Court: I am lost as to the time of this meeting. What year was it? Apparently it was after this case began against you—"you" meaning the company.

The Witness: Yes, your Honor.

[fol. 1038] The Court: Therefore, it must have been within the last three years.

The Witness: No, your Honor. This was prior. The onset of this case possibly was on its way.

Mr. Fritz: No. This was in the winter of 1962 that this meeting took place.

The Court: Are you testifying subject to cross-examination. I am asking the witness.

Mr. Fritz: I beg your pardon. I thought your Honor wanted a date.

The Court: No. I am really testing the witness.

Mr. Fritz: I am sorry, sir.

The Court: He doesn't seem to be very clear about when R. 622 it took place. He at one time said it was after this case began and at another time he hasn't been so sure.

Now, when was this meeting?

The Witness: This meeting was held—I would have to refresh my memory on it, your Honor.

The Court: You haven't got a very clear recollection of when it was held?

The Witness: I have a very clear recollection, your Honor, that I spoke very forcibly to these people.

[fol. 1039] The Court: I didn't ask you that. I will come to the force when I have a little more idea of the time and direction.

The Witness: It was in 1962.

The Court: And what, if anything, prompted the call of the meeting?

The Witness: I can't say whether the Heisley matter had been brought to my attention at that time, but something must have prompted it.

The Court: Outside of your recollection of your own force, do you remember anything else about what caused the meeting to take place, or what the discussion was?

The Witness: I have my handwritten notes of the meeting.

The Court: No. I am not interested at the moment in that. I want to know what is your recollection unstimulated by notes. All you have told me so far is that you spoke forcibly or with force.

The Witness: I brought in all of the district sales managers and told them that there had been certain compromis-[fol. 1040] ing situations uncovered, and that I did not intend to be compromised by it and didn't think that they wanted to be compromised by it, and therefore they had to work with their men even more closely.

The Court: Is that all you can remember?

The Witness: I don't have any other memory of it.

The Court: Now if your counsel want to give you any notes or you can point out any notes which would now refresh your recollection, I am perfectly willing that you should look at them.

The Witness: I didn't bring my bag with me. It's over in the hotel.

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R. 641 Q. Well, tell us, sir: How do you [Thomas P. Drew, President of AFA] formulate these installation charges? You say you have a price formula or something? How do you arrive at those? A. In the first place we don't have any installation charge.

Excerpts from Transcript of Trial.

The Court: No, but suppose you answer the question. How do you arrive at it—by guess? By some rule of thumb? By some more precise calculation? What is your method?

[fol. 1074] The Witness: The advance service charge was originally and still is 100 per cent of the annual service charge. It is an arbitrary figure.

The Court: So it is always 100 per cent of the annual service charge?

The Witness: On sprinkler work, yes.

The Court: Now, how do you arrive at the annual service charge?

The Witness: By taking our costs, all of our costs, and putting together, and, if we are dropping below where we think we should be, we will increase all prices maybe 5 per cent, 7 per cent.

The Court: I must have misunderstood you because I understood you to say that your annual service charge is based on your costs; is that right?

The Witness: All of our charges, sir, are based on our costs of operations.

The Court: It must allow something additional for profit. You are not an eleemosynary institution.

The Witness: Oh, yes, we try to make a little profit, sir.

The Court: Well, what is the profit if you have one?

The Witness: There isn't any exact formula.

R. 642 [fol. 1075] The Court: You mean the annual service charge is cost plus what you can get from the market?

The Witness: No.

The Court: Well, that is what I understand.

The Witness: No. We take our financial statements, and, if we are dropping down, we will say to ourselves, "Well, we perhaps need a price increase."

Now, we examine our costs to see if they are high. If they are high, we will try to reduce the cost in that department. Otherwise, we have to have a price increase to keep our profits up to the level we desire.

Excerpts from Transcript of Trial.

The Court: If I were a professor at the Harvard School of Business Administration instead of a lowly district judge, is this what you would tell me is the way you go about fixing your prices?

The Witness: I am sorry, sir, but that is.

The Court: Have you any graduates of the Harvard School of Business Administration in your shop?

The Witness: Sir——

The Court: Have you?

The Witness: Have I any what?

The Court: Any graduates of the Harvard School of Business Administration in your offices?

[fol. 1076] The Witness: No, we don't.

The Court: Of any other first-rate school of business administration?

The Witness: I don't think we do.

The Court: You mean to say you still fix prices as you would in the days of Queen Victoria?

The Witness: Well, I don't know how she fixed them. But I do try to make it as effective as possible.

The Court: Nothing that is even allegedly scientific?

The Witness: Not at all, sir. I couldn't even graduate from high school.

The Court: I am not interested in whether you could. You can hire people who graduate from high school. You look as though you could pay the bill.

The Witness: I can't very well be scientific.

The Court: Well, you can hire Mr. Fritz. You can also hire a gradute of a school of business administration as well as the graduate of a law school, but you don't try to; is that right?

R. 643 The Witness: Oh, no, sir, we do try to be very accurate and fair in our charges and prices.

The Court: I am not saying you are fair or unfair. [fol. 1077] I quite agree that people who act unscientifically may turn out to be much fairer than people who act logically and rationally. Fairness is a state of mind and attitude. It isn't a pure question of statistical competence.

What I am trying to find out is this: Are you telling me that as large an enterprise as this, once closely related to a public utility and not now very far removed from a public utility status, doesn't do anything whatsoever to try to introduce a system of rationality into price-fixing?

The Witness: Well, sir, we believe——

The Court: Is that your testimony?

The Witness: We believe it is very rational. It works.

The Court: You believe in a wise man instead of a wise rule?

The Witness: No. It works.

The Court: Well, that is what I say.

The Witness: Yes.

The Court: You believe in the Karji at the gate or whatever you call him. In this case I suppose it is the bargainer.

The Witness: I don't recognize that.

[fol. 1078] The Court: It is an Arab custom by which men achieve justice, not by following any rules but by allowing the wise men sitting at the gate to decide how cases should be decided.

As I understand it, you illustrate the first half of President Lowell's famous citation, "The old is for the arts and the new is for the professional", and you are in the old is for the arts: fixing the prices on the basis of what you and the market can stand in your view?

The Witness: Oh, I didn't say that.

The Court: You and the market?

The Witness: Oh—well, no. We fix our prices to make what we consider a fair profit.

The Court: As an art and not as a science?

The Witness: That's right.

The Court: Well, I understand that is what you said.

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R. 644 The Court: May I just point out something by way of a general observation and not as a final ruling in this case at all?

[fol. 1080] And you may agree the analogy is extremely far-fetched. I shouldn't be at all surprised if you think that.

When the Government first moved into the area of regulating labor relations they had to deal with a great many employers who followed principles of general discretion without records and without assigned reasons in connection with the hiring and firing of employees. Over a long period of time those employers had found that method of doing business very satisfactory because they had wise foremen and wise superintendents.

Then when Congress enacted the National Labor Relations Act and set up rather stiff standards with respect to so-called unfair labor practices in which persons and **R. 645** corporations who were alleged to have discriminated against employees by having joined a union or otherwise exercised rights of freedom of association in labor relations, those companies found it very hard to meet a charge or a complaint filed by an employee because they couldn't point to any scientific standards that they had followed [fol. 1081] and a rational system, and every time a charge was made against them, these wise employers were stuck with the fact that they couldn't point to anything except their unexplained and nonrational—I didn't say irrational—nonrational wisdom, and again and again these companies, perhaps undeservedly, were unable to meet the burden borne by the complaining party who said, "You have dismissed me on a discriminatory basis and all you can tell me is that you have acted wisely."

Now, in a sense, what you are getting into in the whole field of economics regulation, antitrust law and other law, is this: When you act in an unexplained, nonrational manner, without any logic that can be explained objectively, you may find that in this welfare state world in which we live you are the victim of a Procrustean bed.

No charge for this statement.

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Excerpts from Transcript of Trial.

R. 655 [fol. 1101] The Court: You [Jesse Markham, Consulting Economist, Arthur D. Little, Inc.] have no difficulty as an economist in finding many different markets, do you?

The Witness: I do not, no, sir.

The Court: And the market power of the company varies according to the market under consideration?

The Witness: I am certain that it must.

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R. 656 The Court: Yes. But from looking at this situation, aren't you [Markham] clear that whatever else goes on there is no rational, scientific or even psuedo-rational or psuedo-scientific attempt to fix prices according to different markets and different degrees of economic situations.

The Witness: Well, Your Honor, that may be due to the fact that competition does not permit the articulation of such a price policy.

The Court: Well, never mind what the reason is. You are not dealing with what by any stretch of the imagination might be called a highly articulated, rational system of prices, are you?

The Witness: I believe you are correct, yes, sir.

Well, as I had indicated, I do put some weight on the [fol. 1104] fact that the firm, however it may arrive at its list price, has to in somewhere between 35 or 40 per cent, as a minimum have to sell at less than the list price because of competition that it confronts.

Now I would like to go into some of the competition that I think it confronts because it has a good deal to do with market definition. I am going to concede at the outset that market definition is, for purposes of antitrust policy, is an extremely complex concept. It varies case by case. It varies Government complaint by Gov- R. 657 ernment complaint. It varies from defendant to defendant. But——

The Court: Not to mention from Judge to Judge.

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Excerpts from Transcript of Trial.

R. 660 [Markham] But I think you can't throw altogether out of the window the fact that when you have two such firms or more actively submitting business that on the average 20 per cent of these subscribers do select other service even when they have two to pick from. They select another form of service over those offered by the two or more competing central station service providers.

The Court: Of course, applying this reasoning to aluminum, there are two or more competing aluminum companies —or there were in the days before Judge Learned Hand wrote his opinion. I am talking about the time when that was an active case. You could show undoubtedly that a large number of customers, after considering the matter—indeed, after having used aluminum for a certain period of [fol. 1113] time—decided they wouldn't go to the other aluminum company, Reynolds or some other company, but instead would use nickel or some other metal.

R. 661 Would that have shown that there was not market power on the part of the Aluminum Company of America? You were not counsel in the case or an economist in the case, were you?

The Witness: No, sir, I was not.

I expect I was working for the Government about this time. I am not sure.

I think it depends, your Honor. Let me just make it quite clear that the fact that someone comes and assesses your product or service and then turns and goes somewhere else to me is not indicative of effective competition. I am much too much on the record of the contrary on this particular point.

The Court: Yes.

The Witness: In this case, however, I can't help but weigh rather heavily the fact that this is not just someone coming to ADT, looking over its services and saying No and running elsewhere. This occurs in a market in which these firms are actively soliciting the firm.

[fol. 1114] Presumably, that firm makes some calculation of the relative merits of this versus this, with respect to price and the type of service, and that is a little different from your buyer of aluminum who says, "Well, I will just not buy aluminum. I will go and buy nickel instead."

All that I can say is what the facts show: That when you have two or more viable central station service competitors competing with each other, actively soliciting the business, even though two or more will lose out in one time out of five to a competing form of service.

When you get into cities where, of course, there is no accredited or approved central station service other than ADT, the competitive picture changes considerably.

The Court: Let me change to a cigar for a moment, and the problem is between cellophane and tinfoil wrappers, and I find out that under 20 per cent of the cases, customers after having for a while used tinfoil or using cellophane, decide to buy unwrapped cigars. Does that show that there [fol. 1115] is no violation of the antitrust laws?

The Witness: You mean, if all of them decide simultaneously?

The Court: Oh, if all of them decide, that is different. Does that change the market for wrapped cigars?

R. 662 The Witness. I would certainly say—I am not a cigar smoker, and I hesitate——

The Court: No, but the Supreme Court is a cigar devourer and for some reason devoured the wrapper argument.

The Witness: Are you asking me if in my opinion, just as a horseback opinion, wrapped cigars compete with unwrapped cigars?

The Court: Yes. Don't they?

The Witness: I would certainly say at the margin they must compete intensely. Whether they compete throughout I am not prepared to say.

The Court: And the fact that they do compete doesn't mean that you can't have market power with respect to

wrapper cigars and the market is the market for wrapped cigars?

[fol. 1116] The Witness: Well, I would argue that you would need to modify any statistics that you would build on the basis of wrapped cigars. If you really did make an inquiry and found that customers switched to unwrapped cigars, then to that extent that market share needs to be downwardly revised.

That is, if I have a firm that has 75 per cent of the wrapped cigar market that narrowly defined but I still find that customers walk to a cigar counter and with reasonable frequency take a look at wrapped and unwrapped cigars, ask their price, find the unwrapped cigar cheaper, and say, "I will take the unwrapped cigar",—to that extent I would surely argue that the wrapped cigar statistics overstate the dominant firms' positions.

The Court: That is very interesting, because it is quite clear, isn't it, from common experience that what you have described as possibly happening with respect to customers of cigars does happen.

There is a very large number of cigar smokers who look when they go into a tobacconist's at both the unwrapped and the wrapped cigars, and you do know, as a matter of fact, the Supreme Court and other tribunals have held that [fol. 1117] the wrapped cigar market is a market.

So that you are really saying that I should try to persuade the Supreme Court to revise its views?

The Witness: No, sir, I am not trying to get you to revise the Supreme Court's views, but let me point out one **R. 663** real difference between a service market and a commodity market where taste and technical specifications may enter in.

The firm in this case unquestionably is buying one thing, and that is protection for the prevention of financial disaster brought on by the loss of assets.

He can, of course, avoid financial disaster basically in one of two ways: He can subscribe to services that offer

reasonable assurance that the loss will never happen, or he can forget some of this and take out insurance and say, "All I wish to make sure of is that if it happens, two months after it happens, I am financially as well off as before it happened."

So I think that it would be a little misleading to compare cigars or aluminum with this. It is a non-revenue producing [fol. 1118] activity of the business firm.

The Court: If I have understood your argument, under those circumstances plain insurance is in the whole market.

The Witness: Well——

The Court: Isn't that right?

The Witness: Not all of insurance is in the market because, clearly, for some types of business enterprise the mere destruction of the place, no matter what his insurance, may be a disaster. That is, you cannot get——

The Court: If you assume Lloyd's insurance which will cover the potential profits as well as the loss of the assets, as I understand it, Lloyd's is always *in the market.* I don't mean in the sense in which lay people understand it, but in the sense that you and I understand it.

The Witness: Yes, I understand that. Still, if it is the type of business where the assets are so unique that if destroyed you could scarcely ever get back into this industry again on the long pull as a corporate enterprise, then I [fol. 1119] would say in those circumstances I think one would be stretching the market definition beyond tolerable limits of elasticity to include insurance.

But I do think in many business enterprises again I would emphasize marginal competition at the margin sufficient enough to at least make some modification of a hard, fast, extremely narrowly defined market in view of the fact that this is a real live option and that certain firms pick it up.

R. 664 The Court: Well now, if I really follow the drift of your points, which I think certainly have a good deal of weight, if it were a close case on the percentage of the

market, then your arguments are very pressing. If, on the other hand, you have a situation where there is an 80 per cent dominance in the market, not much is to be said for the weight that ought to be attached to your arguments. Isn't that right?

The Witness: It depends, unfortunately, upon how,—I suppose—persuasive the data are, and, therefore, how much you would knock down the 80 per cent.

The Court: Yes.

[fol. 1120] The Witness: I mean, I can sum up my own major points and my whole presentation very quickly.

The Government has proposed that the market be defined as approved central station service. It has ascribed or attributed to ADT some 73 per cent of that, indicating it a relevant market. In terms of number of subscribers I believe it runs less—around 65 per cent.

My whole argument is that that, I believe, is clearly demonstrably too high.

The Court: How much would you knock off?

The Witness: Well, that was my next question. The Arthur D. Little report that was presented yesterday, while it didn't make any strong argument for the market being defined this way, did argue that if you did define it as electric protection, it would be not greater than 36 per cent.

Even that per cent impresses me as being subject to some modification in terms of the area of effective competition in a relevant market.

The Court: You would agree that 36 per cent in the textile market would be a monopoly under Section 1 of the Sherman Act, wouldn't you?

[fol. 1121] The Witness: I would not believe that it would be, did you say?

The Court: You would think it would be, wouldn't you?

The Witness: Do I think it would be a monopoly?

The Court: The Supreme Court would regard any one company that has 36 per cent of the textile market as having

monopoly power under Section 1 of the Sherman Act. There is no doubt about that, is there?

The Witness: If there were any mergers attached to it R. 665 getting to 36 per cent, I don't think there would be any question about this whatsoever.

The Court: You don't have to have 50 per cent. You and I know that.

The Witness: No, you do not. That's quite correct. I would agree to that.

The Court: So you could take a pretty big discount from 76 per cent and still be in very grave danger under Section 1 of the Sherman Act.

The Witness: Very big.

[fol. 1122] The Court: You and I understand that that is the view of the Supreme Court, whether it is sound or not.

The Witness: That is correct. I would just say that this market percentage should be revised downward. I wish I could say by what percentage and I could be quite quantitative about it. I just can't. I can only urge that the 70-some per cent is too large. I am certain it is, though, less than 35 per cent as a true indication of ADT's market share.

The Court: Let me just say: In case your clients and your associates who are counsel in this case think you are giving away the case, let me tell you that your candor is the strongest point in your testimony and that I find you very persuasive, because I think you are testifying the same way now as you would testify if you were called as a Government witness.

The Witness: Thank you, sir.

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The Court: You are excused. You have been very helpful.

[fol. 1123] The Witness. Well, thank you.

The Court: It is the only time I have really been able to see something that is important to the case.

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Excerpts from Transcript of Trial.

June 24, 1964

(Sixth Day)

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R. 668 JAMES DOUGLAS FLEMING, Sworn

Direct examination.

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Q. And your occupation? A. President of the Grinnell Corporation.

Q. For how long have you been employed by the Grinnell Corporation? A. Since I was discharged from the Navy in World War I, March, 1919.

[fol. 1130] Q. Would you tell us briefly the positions you have held since that time? What did you start as? A. I started as a sprinkler fitter's helper with the Grinnell Company of the Pacific, a wholly-owned subsidiary. I then became a sprinkler engineer, a contracting engineer, superintendent of engineering construction, a plant manager, a credit manager, branch manager in San Francisco, Oakland, and I was made vice-president and manager of the Pacific Company. Then I was moved to Providence, Rhode Island, the home office, in 1940, as supply sales manager. In 1942 I became executive vice-president of the Grin-

R. 669 nell Corporation, a director in 1943 and president in 1948 and have been the president ever since.

Q. You mentioned one subsidiary of Grinnell, the Grinnell Company of the Pacific. How many other subsidiaries are there? A. Grinnell has 24 consolidated subsidiaries and three unconsolidated subsidiaries.

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Q. And the unconsolidated? A. The three unconsolidated are those in the foreign line of business, service business. They are the Automatic Fire Alarm, Holmes Electric and ADT, and those are carried on our balance sheet as merely an investment of what we have paid for them.

Excerpts from Transcript of Trial.

Q. What is your interest in each of those three, Grinnell's interest? A. 100 per cent in Holmes, 89 per cent in Automatic Fire Alarm and 76 per cent in ADT.

Q. Is this differentiation between the consolidated and the unconsolidated subsidiaries shown on a balance sheet that is submitted to the stockholders of the Grinnell Corporation as part of your Annual Reports? A. Yes, it is.

Q. Since how long has that been done? A. Ever since we acquired an interest in Automatic Fire Alarm.

Q. Approximately what year would that be? [fol. 1132] A. 1949.

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Q. Considering the Grinnell Corporation, together with R. 670 all of its consolidated subsidiaries, would you describe their business, please, generally? A. The business is the manufacturing of cast and malleable iron fittings, valves, cast brass fittings, pipe hangers, pipe fittings. The Sales Division is divided into three main categories. The Supply Sales Division, which has in the United States 35 branch warehouses and does 71 per cent of our business.

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Q. In the Supply Sales Division who are your major competitors? A. Crane and American Standard are both larger than we are. I think they have about 65 warehouses against our 35 in the United States. Then there is Nolen, Republic Supply, and several hundred and probably thousands of independent jobbers or distributors.

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R. 671 Q. Would you have any idea how many sprinkler systems in the United States would have sprinkler supervisory and waterflow alarm systems available to them? A. It would be less than half.

Q. Do you have any way of knowing how much less than half? A. No, I don't. All I know is a large part of the sprinkler systems are installed in manufacturing plants,

which are not built near a city today, because most manufacturing plants are built in a smaller community or out in the country because of automobiles, so that you can get there readily. The central stations are generally only located where there is a large community.

Q. Do you know what the range of a central station is, approximately? **R. 672** A. I believe it is something like 15 to 20 miles. I am not a specialist on central station.

Q. We have heard some talk here about actuating devices. An actuating device is physically connected to this [fol. 1136] sprinkler head in some way when there is a sprinkler supervisory system installed, is it? A. No, it is not.

Q. Can you give us some approximation of what percentage of ADT's business is sprinkler supervisory and waterflow alarm business? A. Approximately 29 per cent of their total revenue.

Q. Does ADT do any other business with respect to any products that are manufactured by Grinnell, and if I may be a little more specific, there is some relation between the sprinkler supervisory and waterflow alarm system and the sprinkler head, and I am asking is there any relation between any other service offered by ADT and any other product of Grinnell? A. No, there is not.

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R. 679 Q. This agreement [Gr. Ex. J 50; R. 4164], dated June 16, 1953, states in part that of the purchase price, five per cent, or $625,000, was to be paid down, and the rest was to be paid at the closing to be held July 8, 1953. Then there are two cover pages postponing the closing date from that date to October 1, 1953, or at such date prior to that time as Grinnell may [fol. 1150] specify by ten days' written notice to Western Union. Would you tell me how that change in the closing date came about? A. I received a letter from Mr. Barnes of the Department of Justice asking that we hold up the closing. He didn't say it was illegal

but that he did want certain information presented to the Department of Justice so they could study it.

Q. Is that the letter I am holding in my hand, marked GRJ-52, or is that a copy of such a letter? A. Yes, that is a copy of such a letter.

Mr. Story: Your Honor, for the record, I object to this on the basis that it is completely irrelevant and immaterial to the issues in this case.

The Court: Overruled.

R. 680 (Letter dated June 29, 1953 from Stanley N. Barnes, Assistant Attorney General, to Mr. J. D. Fleming, President, Grinnell Corporation, Defendants' [Grinnell] Exhibit J-52, [R. 4205] received in evidence.)

Q. On receipt of that letter did you and the other officers of Grinnell confer with respect to it? A. Yes, we did.

[fol. 1151] Q. What decision was made? A. We decided that unless we could get a clearance from the Department of Justice we definitely would not go through with the deal, even if we had to forfeit the $625,000 down payment which we had made.

Q. Is that what occasioned this change in the closing date that I referred to earlier? A. Yes.

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R. 681 Q. The Department of Justice did, however, thereafter acknowledge receipt of this information, did they? A. That is correct.

[fol. 1153] Q. They did so by a letter from Mr. Barnes? A. Yes, sir.

Q. Were you advised that there was a letter from Mr. Barnes to you or to your attorneys? A. Do you mean asking for additional information?

Q. No, sir. I believe there were only two letters from Mr. Barnes in this case. A. I know our attorneys received a letter from the Department of Justice that they told me was a clearance letter, that gave us a clearance so we could go ahead with the deal.

Q. Can you fix the approximate date of that letter, what month it was? A. I believe it was in July of 1953.

Q. Exhibit GRJ-55 [R. 4208] is a letter from Mr. Barnes to Mr. Fritz, dated July 23, 1953. Did you thereafter go ahead with the closing? A. Yes, we did.

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R. 684 [fol. 1159] Q. Referring to page 4, the next to the last paragraph of that memorandum, [GX 125] it states, "Mr. Fleming said he thought that perhaps A.F.A. might be entitled to a higher percentage participation than finally agreed upon for Grinnell. He expressed the desire of the Grinnell Company to be eminently fair in any dealings which affected the Automatic Fire Alarm Company, because of the minority stock interest in that company which presently amounts to about 19 per cent."

Did you say that or something very much like that? A. Yes, I did, and I meant it.

Q. Did you say that because you felt that maybe A.F.A. would get a better price because of your having said that? A. No. It was mainly because I thought we should very definitely have gone to the minority stockholders.

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R. 687 Q. Did that handshake meeting eventually result in a formal contract? A. Yes, it did.

Q. And was that the contract of December 29, 1952, that has been received in evidence as Government's Exhibit GX-89? A. That is correct.

Q. As of the time that that contract was entered into, that is late 1952, were you aware of any changes that ADT [fol. 1165] planned to make in its organization and operations with respect to the manner in which actuating devices would be manufactured and installed? A. Yes.

Q. What were those changes? A. That ADT would have the right to purchase the devices from anyone they wished to or to make them themselves, and they would have the

right to have anyone install them that they wished, any sprinkler company.

Q. Did ADT commence plans to manufacture its own devices at or about that time? A. Yes. They actually made plans previous to that. They had bought equipment.

Q. And do they now make their own devices? A. Yes, they do. They built a plant in Clifton, New Jersey to manufacture supervisory devices at this plant.

Q. And as a result of that did Grinnell cease making these actuating devices? A. Yes.

Q. When was the changeover finally completed? A. I believe it was 1961.

[fol. 1166] Q. What did ADT do with respect to implementing its plan to have any sprinkler installer install these actuating devices at about this time? A. ADT decided that they would offer the installation to whatever company installed the sprinkler system.

R. 688 Q. Those decisions were taken before Mr. Glickauf came along and before you had any interest in ADT, is that correct? A. Yes, that is correct.

Q. Were they taken on advice of counsel, do you know? A. Not that I know of.

Q. When you acquired control of ADT, did you make any changes in those decisions? A. No. I told Mr. Gaston I felt that they should buy the devices from whomever they could get them the cheapest, the quality they wanted, or manufacture them themselves. In fact, I believe—I thought that ADT could beat Grinnell's cost because we were using men for making these devices when women could do the work, particularly the electrical part.

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R. 690 Q. Following Grinnell's acquisition of these three Alarm [fol. 1171] Company subsidiaries did Grinnell make any changes at all in the management of the these companies or their management teams? A. No, they did not.

Q. Did it make any basic changes with respect to methods of operations of these companies? A. No.

Q. Was there any particular reason for that? A. Well, Grinnell did not know anything about the central station business. In fact, before we bought Holmes from the New York Telephone Company, we insisted on Henry Ward, the President, entering into an employment contract with us so we could be sure we had somebody in Holmes who knew the business.

Q. Were there also some considerations with respect to your not having 100 per cent of each of these corporations? A. That is correct.

Q. What were they? A. Well, being that we had minority stockholders' inter- **R. 691** est in ADT and Automatic Fire Alarm, we did not see how we could favor one company over another company.

[fol. 1172] Q. Do you and other members of the Grinnell organization sit on the boards of directors of these companies? A. Yes, we do.

Q. Apart from being directors, does any member of the Grinnell organization, or any employee, or officer, or director or agent thereof, do any of these people have any employment with any of the three Alarm Companies? A. No, they do not.

Q. We spoke a little earlier about consolidated and unconsolidated subsidiaries. Does Grinnell freely transfer personnel within the group of consolidated subsidiaries? A. Yes.

The Court: Mr. McInerney, I am going to interrupt you for just a moment with respect to the question before the last.

Mr. McInerney: Yes, your Honor.

The Court: Mr. Fleming, I mean this as a compliment and not otherwise. I am deeply impressed with your familiarity with the company and your clarity of presentation and, if I may say so, your obvious strength of mind.

[fol. 1173] What I would like to know is whether you have any associates who, with all due modesty, you can tell me are comparable. For I have the very definite impression

that if I ever saw a company which was in the control of one Napoleon, I am seeing it now.

The Witness: I'm sorry——?

The Court: I have tried to be fair with you by telling you what impression you are making on me. You are making an impression on me of great strength and force of character, great intellectual ability, unparalleled by any other witness in this case. You have just testified that you as a Director sit on various Boards.

The Witness: That is correct, sir.

The Court: And I am trying to find out whether you have an associate who is in any way comparable to you in force of character and mind? And I know it is a very difficult question to put to you because I assume you to be a modest man. But I would like you to tell me whether I am R. 692 mistaken in my view that you are without parallel in this company.

The Witness: Well, I wouldn't say that, your Honor. [fol. 1174] In fact it was only a month ago that we elected four Vice-Presidents to the Grinnell Corporation.

The Court: Well, without even knowing their names, are they people of independent distinction?

The Witness: They are all members of the Grinnell organization who have been with the company more than 30 years. Mr. Rison, our Treasurer, Mr. Davies, who is in charge of our manufacturing, and Mr. Pease, who is in charge of our industrial piping division, were made Executive Vice-Presidents. This is the first time we have had any vice-presidents since I was elected president in 1948.

The Court: I am not trying to mislead you and I hope you realize that. I am just trying to make you aware of a process that is going on in my mind and that might translate itself into a finding of fact in this case.

In determining what the relationship is between a parent corporation and an affiliated corporation, one of the useful methods is to look at the chart of the relationship between Directors in one company and Directors in another com-

pany. [fol. 1175] One way is to look at stock ownership. Those are all objective, easily verifiable standards, but they may not be the most revealing.

Sometimes there is in a series of connected organizations a man so outstanding that if he serves on each Board you know perfectly well that where MacGregor sits is the head of the table, and I rather have that impression with respect to another man of Scotch descent,——

The Witness: Your Honor——

The Court: —or Scottish descent.

The Witness: In the case of Holmes Electric, Henry Ward is President and Chief Executive Officer and presides at the Directors' meetings; in the case of Automatic Fire Alarm, Tom Drew does the same.

It just so happens that I am Chairman of the Board of ADT. The only reason I am Chairman of the Board is because Marshall before me was Chairman of the Board, who was President of Western Union, and so they wanted me to go in as Chairman of the Board.

As far as the responsibility is concerned, all it is is that **R. 693** you run the Directors' meetings. I do not receive any salary, [fol. 1176] no compensation at all except a Director's fee of $75 when we meet.

But I do not take any part whatsoever in the management of any of those companies. I don't know the central station business, your Honor.

The Court: Mr. John D. Rockefeller, Jr. took no compensation in connection with the various Foundations, or organizations of a charitable or eleemosynary character, which he and his father had founded. He rarely allowed himself to be named as even a Director.

No one who ever had anything to do with any of the Rockefeller Foundations, Brotherhoods or the like had any doubt as to where power resided.

I am trying to tell you that I have very little doubt here, unless you point out to me other people, not officers of an

internal nature, not employees, but independent men comparable to you in native force and strength.

The Witness: Well, we have one Director of ADT, Curtis Jordan, who is not an officer of the Grinnell Corporation. He is a Director of the Grinnell Corporation. He is a large stockholder in the Grinnell Corporation, his family is. The [fol. 1177] rest of the Directors are made up of officers of either ADT or the Grinnell Corporation.

The Court: I hope you realize I do not mean anything adversely critical. On the contrary. If I may say this without regarding myself as flattering you, the kind of quality that you have is rare and admirable.

The Witness: Well, I am 67 now, your Honor, and I will be 68 in December, and I hope I haven't been running things like Napoleon.

The Court: No. The word Napoleon has, of course, a pejorative or unfavorable aspect. I did not mean that. What I meant was that kind of ability which rarely emerges but always carries with it command.

The Witness: Thank you, sir.

Q. I would like to ask you one further question in connection with this. Since you and the other Grinnell men have been sitting on the Boards of Directors of these companies, do you recall any instance where the Board of Directors has vetoed or rescinded or over-ridden any management proposal or plan? **R. 694** A. We had one instance in ADT. It was a question of [fol. 1178] whether ADT was to go ahead with a central station in Paris, France. Mr. O'Brien and Mr. McDonald voted against it. Mr. Gaston and the rest of the Directors voted for it. And we are going ahead with it as rapidly as possible. But that is the only instance that I know of.

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Q. Has Grinnell given any financial help to these subsidiaries? A. No, it has been the reverse. We received financial help from them.

Q. How many stockholders does Grinnell have? A. A little over 5,000.

Q. Where are they centered? Are they in Rhode Island or where? A. No, they are in the 50 states.

Q. All 50 states? A. Yes.

Q. And apart from the AFA interest in Grinnell, approxi- R. 695 mately how large a holding does the largest stockholder have? A. Well, there is no stockholder, individual stockholder that has two per cent. The Diversified Investors Syndicate, [fol. 1180] I believe it is, in Minneapolis, a million dollar firm, does own slightly over two per cent.

Q. Do you know anything with respect to whether that is a one-man outfit or whether it is more widely held? A. It is more widely held.

Mr. McInerney: Your witness, Mr. Story.

Mr. Fritz: Could I ask just one question, your Honor?

The Court: Oh, yes, certainly. Go right ahead, Mr. Fritz.

Cross examination by Mr. Fritz:

Q. Mr. Fleming, you have been associated, in a sense, as a Director of ADT with Lawrence J. O'Brien, now the President of that company, have you not? A. That is correct.

Q. And that goes back quite a number of years, is that correct? A. Yes. I think he has been President two years.

Q. And you just noted a moment ago an instance in which you said that Mr. O'Brien voted No against a proposition [fol. 1181] where the other Directors voted Yes; is that correct? A. That is correct. And Mr. McDonald voted with Mr. O'Brien.

Q. I wanted to ask you from your observation of Mr. O'Brien over the years whether you feel that he is a man of native force and strength? A. Yes, I do.

Mr. Story: Your Honor, I have to object.

The Court: He is trying to persuade me and I will allow him to try.

Mr. Fritz: I thought your Honor might be interested in what Mr. Fleming knows on the subject, and I think he knows a lot.

The Court: Yes. I think he certainly knows a lot.

Mr. Fritz: Thank you, sir.

R. 696 The Court: Is there any further examination of Mr. Fleming?

Mr. Story, is there any examination?

Mr. Story: No, your Honor.

The Court: All right.

Mr. Story: But I would like to make a statement.

[fol. 1182] The Court: I will allow you to make a statement. But I will also allow Mr. Fleming to go about his business, if he wants to. If you don't want him, he is discharged as a witness.

The Witness: Thank you, sir.

The Court: Now you want to make a statement.

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R. 697 The Court: Do the defendants conclude their case?

Mr. Fritz: Yes, sir.

[fol. 1184] The Court. Has the plaintiff any rebuttal?

Mr. Story: No, your Honor.

The Court: On Friday, September 11, 1964, you will please serve upon opposing parties and file with the Clerk of this Court your briefs. No brief more than 40 pages will be received, but the appendices may be unlimited. That is, any particular point that you set forth in the 40 pages may be elaborated in a longer appendix, but I want the 40 page presentation from each side so that I have it as it were as a summary of your total position, but I am not placing any limit on the number of appendices nor the length of any appendix. So the effect is that the briefs are without limitation of space but there is a summary of 40 pages.

Excerpts from Transcript of Trial.

Reply briefs to be served on the other side and filed in Court by Friday, October the 2nd. Oral argument to be in this court on Friday, October the 9th.

I notify you in advance as firmly and clearly as possible that I intend if I should find, and I underline the words "if I should find" and underline it four times, in favor of the [fol. 1185] Government, I shall deal in my final stage with not merely questions of liability but questions of relief, so that the Findings, Conclusions and Decree will cover relief or remedy, if appropriate, as well as liability, if any.

Should I deal with the problem of relief I want you to be aware that I am thinking of possibilities more inclusive than those mentioned by the Government either in its complaint, or its briefs or in its presentation orally or otherwise.

In particular, if I should find a violation with respect to monopolization, I might deem it appropriate to consider a quasi-public utility regulation of the pricing policies of the central and adjacent parts of the monopoly, so that I might require pricing of all kinds by all of the defendants, or some of them, to be submitted to the Department of Justice and to the general public with the rational explanation of the basis upon which a price was calculated.

I also call to your attention that if I frame the Decree involving relief, I may consider appropriate an injunction R. 698 against the defendants continuing to employ officers or em- [fol. 1186] ployees whom I find have either deliberately or negligently participated in violations of the Anti-Trust Act. That is, I may require the companies no longer to employ those who by their inattention failed to deter the companies who were in their charge from engaging in conduct violative of the laws of the Nation.

Is there anything else?

Mr. Fritz: I have just one question. I assume your Honor would feel that the brief that I should submit with

respect to the three Alarm Companies should also be kept within the limits that your Honor indicated.

The Court: Yes. There really is no limit. All that I said is that I want a 40-page summary of whatever you say.

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(Whereupon at 11.25 a.m. the trial was concluded.)